

B 2
STORAGE



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761114680036>

CA20N
LR
- 054

ONTARIO LABOUR RELATIONS BOARD REPORTS



July 1991



ONTARIO LABOUR RELATIONS BOARD

Chair M.G. MITCHNICK

Alternate Chair R.O. MACDOWELL

Vice-Chairs
M. BENDEL
L. DAVIE
N.V. DISSANAYAKE
O.V. GRAY
R.J. HERMAN
B. HERLICH
R.D. HOWE
J. JOHNSTON
B. KELLER
P. KNOFF
J. McCORMACK
M.A. NAIRN
K. O'NEIL
K. PETRYSHEN
N.B. SATTERFIELD
I.M. STAMP
G. SURDYKOWSKI
S.A. TACON

Members

J. ANDERSON
B.L. ARMSTRONG
C.A. BALLENTINE
W.A. CORRELL
K.S. DAVIES
A.R. FOUCAULT
W.N. FRASER
P.V. GRASSO
A. HERSHKOVITZ
M. JONES
F. KELLY
J. KENNEDY
H. KOBRYN
J. KURCHAK
J. LEAR
D.A. MacDONALD
W.J. McCARRON
C. McDONALD
R.D. McMURDO
R.R. MONTAGUE

J.W. MURRAY
W.S. O'NEILL
D.A. PATTERSON
H. PEACOCK
R.W. PIRRIE
J. REDSHAW
K.V. ROGERS
J.A. RONSON
M.A. ROSS
J.A. RUNDLE
G.O. SHAMANSKI
R.M. SLOAN
E.G. THEOBALD
J. TRIM
M. VUKOBRAT
S. WESLAK
W.H. WIGHTMAN
N.A. WILSON
D.G. WOZNIAK

Registrar T.A. INNISS

Board Solicitors
K. HEWSON
R. LEBI
K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1991] OLRB REP. JULY

EDITOR: RON LEBI



Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1. AluminArt Products Limited; Re U.S.W.A.; Re Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351	797
2. Associated Toronto Taxi-Cab Co-operative Limited; Re R.W.D.S.U., AFL:CIO:CLC:	805
3. Avenue II Community Program Services (Thunder Bay) Incorporated; Re O.P.S.E.U.	807
4. Bot Construction (Canada) Limited; Re I.U.O.E., Local 793.....	812
5. Buchin, Howard; Re Toronto Civic Employee's Union, Local 43; Re The Municipality of Metropolitan Toronto.....	815
6. Canadian Banklock Service Ltd.; Re U.F.C.W.	818
7. E. S. Fox Limited, E. Spencer Construction Ltd.; Re B.S.O.I.W., Local 736; Re Ironworkers District Council of Ontario.....	819
8. Electrical Power Systems Construction Association and Ontario Hydro; Re I.B.E.W., Local 1788	832
9. Fabricland Distributors Inc.; Re Brewery, Malt & Soft Drink Workers, Local 304	836
10. Grant Forest Products Corporation; Re C.P.U.	848
11. Harrow Ambulance Service; Re Harrow Ambulance Employees Association	869
12. Ideal Railings Limited; Re C.J.A., Local 27	873
13. PCL Constructors Eastern Inc.; Re Eric Dagenais	879
14. Peter Kiewit Sons Co. Ltd.; Re L.I.U.N.A., Local 837; Re C.J.A., Local 38; Re Ontario Provincial District Council	881
15. STM Specialized Transit Management Corporation All-Way Transportation Corporation, Toronto Transit Commission; Re A.T.U., Local 113	900
16. Smith, Perino; Re CAW-TCA Canada, Local 112 & The De Havilland Aircraft Company of Canada / A Division of Boeing of Canada Ltd.	912
17. ThunderBay Golden Nugget Saloon, 2628181 Manitoba Ltd. c.o.b. as; Re Hospitality, Commercial and Service Employees Union, Local 73	918
18. Toyota Canada Inc.; Re C.A.W.	922
19. York University; Re York University Staff Association.....	930

COURT PROCEEDINGS

1. Knob Hill Farms Limited; Re U.F.C.W., Local 206, The Crown in Right of Ontario (Minister of Labour), Ontario Labour Relations Board and Susan Caterina.....	932
2. Ontario Hydro and C.U.P.E. - C.L.C. Ontario Hydro Employees Union, Local 1000; Re Ontario Labour Relations Board, The Society of Ontario Hydro Professional and Administrative Employees, the Coalition to stop certification of the Society on behalf of certain	

APPENDIX 10

The following is a list of the names of the persons who have been appointed as members of the Commission on the Status of Women since its establishment in 1971. The names are listed in alphabetical order of their last names. The names of the persons who have been appointed as members of the Commission since 1980 are listed in italics.

SUBJECT INDEX

- Bargaining Rights - Certification - Jurisdictional Dispute - Unfair Labour Practice - Carpenters unable to conclude first collective agreement and subsequently commencing strike - Employer making collective agreement with Labourers and hiring all employees through Labourers hiring hall - Labourers applying for certification to displace Carpenters' bargaining rights - Carpenters alleging that employer and Labourers conspiring to undermine Carpenters' bargaining rights - Board concluding that Carpenters really complaining about work assignment and that matter should be dealt with by way of jurisdictional dispute machinery provided by *Act* - Board also rejecting Carpenters' assertion that persons employed on application date were "labourers" and not "carpenters" - Registrar directed to arrange for ballots to be counted - Unfair labour practice complaint dismissed
- PETER KIEWIT SONS CO. LTD.; RE L.I.U.N.A., LOCAL 837; RE C.J.A., LOCAL 38; RE ONTARIO PROVINCIAL DISTRICT COUNCIL..... 881
- Bargaining Unit - Certification - Pre-Hearing Vote - Employer operating head office, warehouses and vehicle distribution centre out of five separate locations - One location temporary - No interchange of employees between the locations - Union seeking site specific bargaining unit including head office and adjacent warehouse - Employer proposing municipal unit - Board finding union's proposed unit appropriate and directing that ballots cast by employees in that unit be counted
- TOYOTA CANADA INC.; RE C.A.W. 922
- Bargaining Unit - Certification - Whether "home support workers" employed by social service agency ought to be excluded from all-employee bargaining unit - Board rejecting employer argument that nature of home support workers' responsibilities make them inappropriate for inclusion in any bargaining unit - No compelling evidence of incompatibility between home support workers and other bargaining unit employees - Home support workers included in bargaining unit - Certificate issuing
- AVENUE II COMMUNITY PROGRAM SERVICES (THUNDER BAY) INCORPORATED; RE O.P.S.E.U. 807
- Certification - Bargaining Rights - Jurisdictional Dispute - Unfair Labour Practice - Carpenters unable to conclude first collective agreement and subsequently commencing strike - Employer making collective agreement with Labourers and hiring all employees through Labourers hiring hall - Labourers applying for certification to displace Carpenters' bargaining rights - Carpenters alleging that employer and Labourers conspiring to undermine Carpenters' bargaining rights - Board concluding that Carpenters really complaining about work assignment and that matter should be dealt with by way of jurisdictional dispute machinery provided by *Act* - Board also rejecting Carpenters' assertion that persons employed on application date were "labourers" and not "carpenters" - Registrar directed to arrange for ballots to be counted - Unfair labour practice complaint dismissed
- PETER KIEWIT SONS CO. LTD.; RE L.I.U.N.A., LOCAL 837; RE C.J.A., LOCAL 38; RE ONTARIO PROVINCIAL DISTRICT COUNCIL..... 881
- Certification - Bargaining Unit - Pre-Hearing Vote - Employer operating head office, warehouses and vehicle distribution centre out of five separate locations - One location temporary - No interchange of employees between the locations - Union seeking site specific bargaining unit including head office and adjacent warehouse - Employer proposing municipal unit - Board finding union's proposed unit appropriate and directing that ballots cast by employees in that unit be counted
- TOYOTA CANADA INC.; RE C.A.W. 922

II

Certification - Bargaining Unit - Whether "home support workers" employed by social service agency ought to be excluded from all-employee bargaining unit - Board rejecting employer argument that nature of home support workers' responsibilities make them inappropriate for inclusion in any bargaining unit - No compelling evidence of incompatibility between home support workers and other bargaining unit employees - Home support workers included in bargaining unit - Certificate issuing

AVENUE II COMMUNITY PROGRAM SERVICES (THUNDER BAY) INCORPORATED; RE O.P.S.E.U.

807

Certification - Constitutional Law - Judicial Review - Board determining that it had no jurisdiction over employees working at nuclear generating stations which were federal undertakings pursuant to the *Constitution Act* and s.18 of the *Atomic Energy Control Act* - Divisional Court quashing Board decision - Court of Appeal reinstating Board decision and declaring that *Canada Labour Code* applies to Hydro employees employed at nuclear facilities coming under s.18 of the *Atomic Energy Control Act* - Application for leave to appeal granted by Supreme Court of Canada

ONTARIO HYDRO AND C.U.P.E. - C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE ONTARIO LABOUR RELATIONS BOARD, THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES, THE COALITION TO STOP CERTIFICATION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES, TOM STEVENS, C.S. STEVENSON, MICHELLE MORRISSEY-O'RYAN AND GEORGE ORR; RE THE ATTORNEY GENERAL OF CANADA

946

Certification - Employee - Pre-Hearing Vote - Union applying for pre-hearing vote - Parties disputing voting constituency and respondent taking position that no individuals set out on its lists employed by it - Respondent requesting that Board decline to order vote until hearing held to hear evidence with respect to its position - Board seeing no reason to depart from its normal practice regarding pre-hearing votes - Board directing vote and that ballot box be sealed - Registrar directed to list matter for hearing on all outstanding issues after vote held

ASSOCIATED TORONTO TAXI-CAB CO-OPERATIVE LIMITED; RE R.W.D.S.U., AFL:CIO:CLC:

805

Certification - Membership Evidence - Trade Union - Trade Union Status - Board finding employees' association to be trade union within meaning of the *Act* - Most association members filling out membership cards prior to official existence of association - Whether membership evidence valid - Board finding that employees' actions at association meeting of ratifying constitution, confirming officers, setting dues and authorizing certification application sufficiently confirmatory of membership to rectify situation - Certificate issuing

HARROW AMBULANCE SERVICE; RE HARROW AMBULANCE EMPLOYEES ASSOCIATION

869

Certification - Practice and Procedure - Employer's head office in Quebec and employees having no fixed workplace - Employer directed to fax to Board list of its service technicians in the bargaining unit together with their addresses - Employer directed to advise Board of business address (if any) in Ontario

CANADIAN BANKLOCK SERVICE LTD.; RE U.F.C.W.

818

Certification - Pre-Hearing Vote - Representation Vote - Notices and ballots provided by Board in English and French - Applicant union alleging widespread confusion surrounding taking of vote - Applicant requesting that Board provide voting materials, including ballots, in

Spanish and Punjabi and that new vote be held - Board reviewing and explaining its policy with respect to translation of its documents - Request for re-taking of vote denied

ALUMINART PRODUCTS LIMITED; RE U.S.W.A.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351 797

Collective Agreement - Construction Industry - Construction Industry Grievance - Pick-up agreement binding employer to wage rates and conditions of local contractor's collective agreement - Union alleging breach of collective agreement's travel provision - Board concluding that reference to "employer's yard" in collective agreement means local contractor's yard and not the employer's temporary yard on the job site - Grievance upheld and Board remaining seized with respect to quantification of damages

BOT CONSTRUCTION (CANADA) LIMITED; RE I.U.O.E., LOCAL 793..... 812

Collective Agreement - Construction Industry - Construction Industry Grievance - Severe storm leading employer to cancel afternoon shift - Employees reporting for work not receiving reporting pay - Whether in breach of collective agreement - Collective agreement creating exception to reporting pay obligation where employer considers it necessary to shutdown job to avoid possible loss of life - Employer vested with subjective ability to determine whether shutdown necessary - Language of collective agreement not creating requirement of reasonableness by which to judge employer's decision - Grievance dismissed

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND ONTARIO HYDRO; RE I.B.E.W., LOCAL 1788 832

Constitutional Law - Certification - Judicial Review - Board determining that it had no jurisdiction over employees working at nuclear generating stations which were federal undertakings pursuant to the *Constitution Act* and s.18 of the *Atomic Energy Control Act* - Divisional Court quashing Board decision - Court of Appeal reinstating Board decision and declaring that *Canada Labour Code* applies to Hydro employees employed at nuclear facilities coming under s.18 of the *Atomic Energy Control Act* - Application for leave to appeal granted by Supreme Court of Canada

ONTARIO HYDRO AND C.U.P.E. - C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE ONTARIO LABOUR RELATIONS BOARD, THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES, THE COALITION TO STOP CERTIFICATION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES, TOM STEVENS, C.S. STEVENSON, MICHELLE MORRISSEY-O'RYAN AND GEORGE ORR; RE THE ATTORNEY GENERAL OF CANADA 946

Construction Industry - Collective Agreement - Construction Industry Grievance - Pick-up agreement binding employer to wage rates and conditions of local contractor's collective agreement - Union alleging breach of collective agreement's travel provision - Board concluding that reference to "employer's yard" in collective agreement means local contractor's yard and not the employer's temporary yard on the job site - Grievance upheld and Board remaining seized with respect to quantification of damages

BOT CONSTRUCTION (CANADA) LIMITED; RE I.U.O.E., LOCAL 793..... 812

Construction Industry - Collective Agreement - Construction Industry Grievance - Severe storm leading employer to cancel afternoon shift - Employees reporting for work not receiving reporting pay - Whether in breach of collective agreement - Collective agreement creating exception to reporting pay obligation where employer considers it necessary to shutdown job to avoid possible loss of life - Employer vested with subjective ability to determine

IV

whether shutdown necessary - Language of collective agreement not creating requirement of reasonableness by which to judge employer's decision - Grievance dismissed

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND
ONTARIO HYDRO; RE I.B.E.W., LOCAL 1788.....

832

Construction Industry - Construction Industry Grievance - Damages - Related Employer - Remedies - Welland company and Hamilton company alleged to be related employers - Union claiming failure to pay proper commuting allowance - Companies arguing that union estopped by its conduct from relying on section 1(4) of the *Act* - Board applying principles in *KNK Limited* case - Related employer declaration issuing without retrospective effect - Damages ordered for breach of commuting allowance provision - Liability running from date of grievance to expiry of collective agreement

E. S. FOX LIMITED, E. SPENCER CONSTRUCTION LTD.; RE B.S.O.I.W., LOCAL
736; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO.....

819

Construction Industry - Construction Industry Grievance - Discharge - Grievor failing to report for work and failing to notify employer of absence - Employer relying on culminating incident to justify discharge - Although grievor's record far from exemplary, Board not satisfied that prior to culminating incident grievor was employee perched precariously on edge of discharge even for the most minor infraction - Grievance upheld in part - Ten day suspension substituted for discharge - Reinstatement with compensation ordered

IDEAL RAILINGS LIMITED; RE C.J.A., LOCAL 27

873

Construction Industry Grievance - Collective Agreement - Construction Industry - Pick-up agreement binding employer to wage rates and conditions of local contractor's collective agreement - Union alleging breach of collective agreement's travel provision - Board concluding that reference to "employer's yard" in collective agreement means local contractor's yard and not the employer's temporary yard on the job site - Grievance upheld and Board remaining seized with respect to quantification of damages

BOT CONSTRUCTION (CANADA) LIMITED; RE I.U.O.E., LOCAL 793.....

812

Construction Industry Grievance - Collective Agreement - Construction Industry - Severe storm leading employer to cancel afternoon shift - Employees reporting for work not receiving reporting pay - Whether in breach of collective agreement - Collective agreement creating exception to reporting pay obligation where employer considers it necessary to shutdown job to avoid possible loss of life - Employer vested with subjective ability to determine whether shutdown necessary - Language of collective agreement not creating requirement of reasonableness by which to judge employer's decision - Grievance dismissed

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND
ONTARIO HYDRO; RE I.B.E.W., LOCAL 1788.....

832

Construction Industry Grievance - Construction Industry - Damages - Related Employer - Remedies - Welland company and Hamilton company alleged to be related employers - Union claiming failure to pay proper commuting allowance - Companies arguing that union estopped by its conduct from relying on section 1(4) of the *Act* - Board applying principles in *KNK Limited* case - Related employer declaration issuing without retrospective effect - Damages ordered for breach of commuting allowance provision - Liability running from date of grievance to expiry of collective agreement

E. S. FOX LIMITED, E. SPENCER CONSTRUCTION LTD.; RE B.S.O.I.W., LOCAL
736; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO.....

819

Construction Industry Grievance - Construction Industry - Discharge - Grievor failing to report for work and failing to notify employer of absence - Employer relying on culminating incident to justify discharge - Although grievor's record far from exemplary, Board not satis-

fied that prior to culminating incident grievor was employee perched precariously on edge of discharge even for the most minor infraction - Grievance upheld in part - Ten day suspension substituted for discharge - Reinstatement with compensation ordered

IDEAL RAILINGS LIMITED; RE C.J.A., LOCAL 27 873

Damages - Construction Industry - Construction Industry Grievance - Related Employer - Remedies - Welland company and Hamilton company alleged to be related employers - Union claiming failure to pay proper commuting allowance - Companies arguing that union estopped by its conduct from relying on section 1(4) of the *Act* - Board applying principles in *KNK Limited* case - Related employer declaration issuing without retrospective effect - Damages ordered for breach of commuting allowance provision - Liability running from date of grievance to expiry of collective agreement

E. S. FOX LIMITED, E. SPENCER CONSTRUCTION LTD.; RE B.S.O.I.W., LOCAL 736; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO 819

Discharge - Construction Industry - Construction Industry Grievance - Grievor failing to report for work and failing to notify employer of absence - Employer relying on culminating incident to justify discharge - Although grievor's record far from exemplary, Board not satisfied that prior to culminating incident grievor was employee perched precariously on edge of discharge even for the most minor infraction - Grievance upheld in part - Ten day suspension substituted for discharge - Reinstatement with compensation ordered

IDEAL RAILINGS LIMITED; RE C.J.A., LOCAL 27 873

Discharge - Discharge for Union Activity - Unfair Labour Practice - Probationary employee discharged shortly after engaging fellow employees in discussion about possibility of organization of union - Board not persuaded that no part of discharge was in response to news of potential union drive - Complaint upheld - Reinstatement with compensation and posting ordered

FABRICLAND DISTRIBUTORS INC.; RE BREWERY, MALT & SOFT DRINK WORKERS, LOCAL 304 836

Discharge for Union Activity - Discharge - Unfair Labour Practice - Probationary employee discharged shortly after engaging fellow employees in discussion about possibility of organization of union - Board not persuaded that no part of discharge was in response to news of potential union drive - Complaint upheld - Reinstatement with compensation and posting ordered

FABRICLAND DISTRIBUTORS INC.; RE BREWERY, MALT & SOFT DRINK WORKERS, LOCAL 304 836

Duty of Fair Representation - Practice and Procedure - Reconsideration - Unfair Labour Practice - Board dismissing complaint because complainant failed to appear at scheduled hearing - Complainant seeking reconsideration on grounds that he mistakenly believed hearing was scheduled for another date - Board's notice of hearing clearly indicated date of hearing and received at least a month in advance of hearing date - Board finding complainant negligent and holding that non-attendance resulting from negligence not a reason to reconsider decision - Application for reconsideration dismissed

BUCHIN, HOWARD; RE TORONTO CIVIC EMPLOYEE'S UNION, LOCAL 43; RE THE MUNICIPALITY OF METROPOLITAN TORONTO 815

Duty of Fair Representation - Unfair Labour Practice - Complainant arguing that union's failure to process overtime grievance to arbitration violating the *Act* - Board finding that union considered grievance on its merits, taking into account relevant matters, and acted reason-

ably in coming to its decision that grievance would not succeed at arbitration - Complainant dismissed

SMITH, PERINO; RE CAW-TCA CANADA LOCAL 112 & THE DE HAVILLAND AIRCRAFT COMPANY OF CANADA / A DIVISION OF BOEING OF CANADA LTD.

912

Employee - Certification - Pre-Hearing Vote - Union applying for pre-hearing vote - Parties disputing voting constituency and respondent taking position that no individuals set out on its lists employed by it - Respondent requesting that Board decline to order vote until hearing held to hear evidence with respect to its position - Board seeing no reason to depart from its normal practice regarding pre-hearing votes - Board directing vote and that ballot box be sealed - Registrar directed to list matter for hearing on all outstanding issues after vote held

ASSOCIATED TORONTO TAXI-CAB CO-OPERATIVE LIMITED; RE R.W.D.S.U., AFL:CIO:CLC:

805

Employee Reference - Evidence - Practice and Procedure - Board earlier appointing Officer to inquire into named person's duties and responsibilities - Employer agreeing to commence examinations while reserving its right to raise issue of estoppel - Board finding it preferable to determine any estoppel issue directly and as preliminary matter - Employer directed to advise Board in writing whether it intends to pursue estoppel argument and, if so, to provide full particulars - If so advised, Board to conduct hearing into estoppel issue and union directed to file fully particularized statement of facts in reply - Except with leave of the Board, neither party to be permitted to adduce evidence of any fact not particularized

YORK UNIVERSITY; RE YORK UNIVERSITY STAFF ASSOCIATION

930

Evidence - Employee Reference - Practice and Procedure - Board earlier appointing Officer to inquire into named person's duties and responsibilities - Employer agreeing to commence examinations while reserving its right to raise issue of estoppel - Board finding it preferable to determine any estoppel issue directly and as preliminary matter - Employer directed to advise Board in writing whether it intends to pursue estoppel argument and, if so, to provide full particulars - If so advised, Board to conduct hearing into estoppel issue and union directed to file fully particularized statement of facts in reply - Except with leave of the Board, neither party to be permitted to adduce evidence of any fact not particularized

YORK UNIVERSITY; RE YORK UNIVERSITY STAFF ASSOCIATION

930

First Contract Arbitration - Judicial Review - Stay - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining, and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to section 40a(22) of the *Act* - Employer asking court to stay Board decision pending disposition of judicial review application - Court finding no strong *prima facie* case - Stay application dismissed

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206, THE CROWN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), ONTARIO LABOUR RELATIONS BOARD AND SUSAN CATERINA.....

932

First Contract Arbitration - Volume of company proposals, their content, the rationales advanced for them, the point at which they were withdrawn or modified and the format of company's bargaining approach leading Board to find that company failed to make reasonable or expeditious efforts to conclude a collective agreement - Board left with a number of unanswered

questions about company's financial justification for final offer - Final offer uncompromising and without reasonable justification - First contract arbitration directed

GRANT FOREST PRODUCTS CORPORATION; RE C.P.U. 848

Health and Safety - Complainant health and safety representative laid off and alleging breach of section 24(1) of the *Occupational Health and Safety Act* - Board not satisfied with reasons proffered by company for selecting complainant for lay-off - Complaint upheld - Reinstatement with compensation ordered

PCL CONSTRUCTORS EASTERN INC.; RE ERIC DAGENAIS 879

Judicial Review - Certification - Constitutional Law - Board determining that it had no jurisdiction over employees working at nuclear generating stations which were federal undertakings pursuant to the *Constitution Act* and s.18 of the *Atomic Energy Control Act* - Divisional Court quashing Board decision - Court of Appeal reinstating Board decision and declaring that *Canada Labour Code* applies to Hydro employees employed at nuclear facilities coming under s.18 of the *Atomic Energy Control Act* - Application for leave to appeal granted by Supreme Court of Canada

ONTARIO HYDRO AND C.U.P.E. - C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE ONTARIO LABOUR RELATIONS BOARD, THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES, THE COALITION TO STOP CERTIFICATION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES, TOM STEVENS, C.S. STEVENSON, MICHELLE MORRISSEY-O'RYAN AND GEORGE ORR; RE THE ATTORNEY GENERAL OF CANADA 946

Judicial Review - First Contract Arbitration - Stay - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining, and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to section 40a(22) of the *Act* - Employer asking court to stay Board decision pending disposition of judicial review application - Court finding no strong *prima facie* case - Stay application dismissed

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206, THE CROWN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), ONTARIO LABOUR RELATIONS BOARD AND SUSAN CATERINA 932

Jurisdictional Dispute - Bargaining Rights - Certification - Unfair Labour Practice - Carpenters unable to conclude first collective agreement and subsequently commencing strike - Employer making collective agreement with Labourers and hiring all employees through Labourers hiring hall - Labourers applying for certification to displace Carpenters' bargaining rights - Carpenters alleging that employer and Labourers conspiring to undermine Carpenters' bargaining rights - Board concluding that Carpenters really complaining about work assignment and that matter should be dealt with by way of jurisdictional dispute machinery provided by *Act* - Board also rejecting Carpenters' assertion that persons employed on application date were "labourers" and not "carpenters" - Registrar directed to arrange for ballots to be counted - Unfair labour practice complaint dismissed

PETER KIEWIT SONS CO. LTD.; RE L.I.U.N.A., LOCAL 837; RE C.J.A., LOCAL 38; RE ONTARIO PROVINCIAL DISTRICT COUNCIL 881

Membership Evidence - Certification - Trade Union - Trade Union Status - Board finding employees' association to be trade union within meaning of the *Act* - Most association members filling out membership cards prior to official existence of association - Whether

VIII

membership evidence valid - Board finding that employees' actions at association meeting of ratifying constitution, confirming officers, setting dues and authorizing certification application sufficiently confirmatory of membership to rectify situation - Certificate issuing

HARROW AMBULANCE SERVICE; RE HARROW AMBULANCE EMPLOYEES ASSOCIATION

869

Practice and Procedure - Certification - Employer's head office in Quebec and employees having no fixed workplace - Employer directed to fax to Board list of its service technicians in the bargaining unit together with their addresses - Employer directed to advise Board of business address (if any) in Ontario

CANADIAN BANKLOCK SERVICE LTD.; RE U.F.C.W.

818

Practice and Procedure - Duty of Fair Representation - Reconsideration - Unfair Labour Practice - Board dismissing complaint because complainant failed to appear at scheduled hearing - Complainant seeking reconsideration on grounds that he mistakenly believed hearing was scheduled for another date - Board's notice of hearing clearly indicated date of hearing and received at least a month in advance of hearing date - Board finding complainant negligent and holding that non-attendance resulting from negligence not a reason to reconsider decision - Application for reconsideration dismissed

BUCHIN, HOWARD; RE TORONTO CIVIC EMPLOYEE'S UNION, LOCAL 43; RE THE MUNICIPALITY OF METROPOLITAN TORONTO

815

Practice and Procedure - Employee Reference - Evidence - Board earlier appointing Officer to inquire into named person's duties and responsibilities - Employer agreeing to commence examinations while reserving its right to raise issue of estoppel - Board finding it preferable to determine any estoppel issue directly and as preliminary matter - Employer directed to advise Board in writing whether it intends to pursue estoppel argument and, if so, to provide full particulars - If so advised, Board to conduct hearing into estoppel issue and union directed to file fully particularized statement of facts in reply - Except with leave of the Board, neither party to be permitted to adduce evidence of any fact not particularized

YORK UNIVERSITY; RE YORK UNIVERSITY STAFF ASSOCIATION

930

Pre-Hearing Vote - Bargaining Unit - Certification - Employer operating head office, warehouses and vehicle distribution centre out of five separate locations - One location temporary - No interchange of employees between the locations - Union seeking site specific bargaining unit including head office and adjacent warehouse - Employer proposing municipal unit - Board finding union's proposed unit appropriate and directing that ballots cast by employees in that unit be counted

TOYOTA CANADA INC.; RE C.A.W.

922

Pre-Hearing Vote - Certification - Employee - Union applying for pre-hearing vote - Parties disputing voting constituency and respondent taking position that no individuals set out on its lists employed by it - Respondent requesting that Board decline to order vote until hearing held to hear evidence with respect to its position - Board seeing no reason to depart from its normal practice regarding pre-hearing votes - Board directing vote and that ballot box be sealed - Registrar directed to list matter for hearing on all outstanding issues after vote held

ASSOCIATED TORONTO TAXI-CAB CO-OPERATIVE LIMITED; RE R.W.D.S.U., AFL:CIO:CLC:

805

Pre-Hearing Vote - Certification - Representation Vote - Notices and ballots provided by Board in English and French - Applicant union alleging widespread confusion surrounding taking of vote - Applicant requesting that Board provide voting materials, including ballots, in

Spanish and Punjabi and that new vote be held - Board reviewing and explaining its policy with respect to translation of its documents - Request for re-taking of vote denied

ALUMINART PRODUCTS LIMITED; RE U.S.W.A.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351 797

Reconsideration - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Board dismissing complaint because complainant failed to appear at scheduled hearing - Complainant seeking reconsideration on grounds that he mistakenly believed hearing was scheduled for another date - Board's notice of hearing clearly indicated date of hearing and received at least a month in advance of hearing date - Board finding complainant negligent and holding that non-attendance resulting from negligence not a reason to reconsider decision - Application for reconsideration dismissed

BUCHIN, HOWARD; RE TORONTO CIVIC EMPLOYEE'S UNION, LOCAL 43; RE THE MUNICIPALITY OF METROPOLITAN TORONTO 815

Reference - Sale of a Business - Respondent union applying for arbitration under section 45 of the *Act* - Applicant company maintaining that Minister without authority to appoint arbitrator - Minister referring two questions to the Board pursuant to section 107 of the *Act* - Board concluding that applicant not a successor employer nor a party to the relevant collective agreement - Board concluding that contested relationship not one of predecessor and successor employer but, rather, a landlord/tenant relationship

THUNDERBAY GOLDEN NUGGET SALOON, 2628181 MANITOBA LTD. C.O.B. AS; RE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73 918

Related Employer - Construction Industry - Construction Industry Grievance - Damages - Remedies - Welland company and Hamilton company alleged to be related employers - Union claiming failure to pay proper commuting allowance - Companies arguing that union estopped by its conduct from relying on section 1(4) of the *Act* - Board applying principles in *KNK Limited* case - Related employer declaration issuing without retrospective effect - Damages ordered for breach of commuting allowance provision - Liability running from date of grievance to expiry of collective agreement

E. S. FOX LIMITED, E. SPENCER CONSTRUCTION LTD.; RE B.S.O.I.W., LOCAL 736; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO 819

Related Employer - Sale of a Business - "TTC" contracting with "STM" for provision of station wagon services for the ambulatory disabled - "TTC" having earlier contracted with "All-Way" for provision of similar services - Board concluding that terms of commercial contract between "TTC" and "STM" not resulting in "TTC" retaining control of subcontracted services - Related employer application as between "TTC" and "STM" dismissed - Parties agreeing that "All-Way" and "STM" carrying on related activities under common control or direction - Board satisfied that union's bargaining rights undermined by transfer of contract with "TTC" from "All-Way" to "STM" - Board making section 1(4) declaration as between "All-Way" and "STM"

STM SPECIALIZED TRANSIT MANAGEMENT CORPORATION ALL-WAY TRANSPORTATION CORPORATION, TORONTO TRANSIT COMMISSION; RE A.T.U., LOCAL 113 900

Remedies - Construction Industry - Construction Industry Grievance - Damages - Related Employer - Welland company and Hamilton company alleged to be related employers - Union claiming failure to pay proper commuting allowance - Companies arguing that union estopped by its conduct from relying on section 1(4) of the *Act* - Board applying principles in *KNK Limited* case - Related employer declaration issuing without retrospective effect -

Damages ordered for breach of commuting allowance provision - Liability running from date of grievance to expiry of collective agreement

E. S. FOX LIMITED, E. SPENCER CONSTRUCTION LTD.; RE B.S.O.I.W., LOCAL 736; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO.....

819

Representation Vote - Certification - Pre-Hearing Vote - Notices and ballots provided by Board in English and French - Applicant union alleging widespread confusion surrounding taking of vote - Applicant requesting that Board provide voting materials, including ballots, in Spanish and Punjabi and that new vote be held - Board reviewing and explaining its policy with respect to translation of its documents - Request for re-taking of vote denied

ALUMINART PRODUCTS LIMITED; RE U.S.W.A.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351.....

797

Sale of a Business - Reference - Respondent union applying for arbitration under section 45 of the *Act* - Applicant company maintaining that Minister without authority to appoint arbitrator - Minister referring two questions to the Board pursuant to section 107 of the *Act* - Board concluding that applicant not a successor employer nor a party to the relevant collective agreement - Board concluding that contested relationship not one of predecessor and successor employer but, rather, a landlord/tenant relationship

THUNDERBAY GOLDEN NUGGET SALOON, 2628181 MANITOBA LTD. C.O.B. AS; RE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73.....

918

Sale of a Business - Related Employer - "TTC" contracting with "STM" for provision of station wagon services for the ambulatory disabled - "TTC" having earlier contracted with "All-Way" for provision of similar services - Board concluding that terms of commercial contract between "TTC" and "STM" not resulting in "TTC" retaining control of subcontracted services - Related employer application as between "TTC" and "STM" dismissed - Parties agreeing that "All-Way" and "STM" carrying on related activities under common control or direction - Board satisfied that union's bargaining rights undermined by transfer of contract with "TTC" from "All-Way" to "STM" - Board making section 1(4) declaration as between "All-Way" and "STM"

STM SPECIALIZED TRANSIT MANAGEMENT CORPORATION ALL-WAY TRANSPORTATION CORPORATION, TORONTO TRANSIT COMMISSION; RE A.T.U., LOCAL 113.....

900

Stay - First Contract Arbitration - Judicial Review - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining, and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to section 40a(22) of the *Act* - Employer asking court to stay Board decision pending disposition of judicial review application - Court finding no strong *prima facie* case - Stay application dismissed

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206, THE CROWN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), ONTARIO LABOUR RELATIONS BOARD AND SUSAN CATERINA.....

932

Termination - First Contract Arbitration - Judicial Review - Stay - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining, and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to manage-

ment rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to section 40a(22) of the *Act* - Employer asking court to stay Board decision pending disposition of judicial review application - Court finding no strong *prima facie* case - Stay application dismissed

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206, THE CROWN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), ONTARIO LABOUR RELATIONS BOARD AND SUSAN CATERINA..... 932

Trade Union - Certification - Membership Evidence - Trade Union Status - Board finding employees' association to be trade union within meaning of the *Act* - Most association members filling out membership cards prior to official existence of association - Whether membership evidence valid - Board finding that employees' actions at association meeting of ratifying constitution, confirming officers, setting dues and authorizing certification application sufficiently confirmatory of membership to rectify situation - Certificate issuing

HARROW AMBULANCE SERVICE; RE HARROW AMBULANCE EMPLOYEES ASSOCIATION 869

Trade Union Status - Certification - Membership Evidence - Trade Union - Board finding employees' association to be trade union within meaning of the *Act* - Most association members filling out membership cards prior to official existence of association - Whether membership evidence valid - Board finding that employees' actions at association meeting of ratifying constitution, confirming officers, setting dues and authorizing certification application sufficiently confirmatory of membership to rectify situation - Certificate issuing

HARROW AMBULANCE SERVICE; RE HARROW AMBULANCE EMPLOYEES ASSOCIATION 869

Unfair Labour Practice - Bargaining Rights - Certification - Jurisdictional Dispute - Carpenters unable to conclude first collective agreement and subsequently commencing strike - Employer making collective agreement with Labourers and hiring all employees through Labourers hiring hall - Labourers applying for certification to displace Carpenters' bargaining rights - Carpenters alleging that employer and Labourers conspiring to undermine Carpenters' bargaining rights - Board concluding that Carpenters really complaining about work assignment and that matter should be dealt with by way of jurisdictional dispute machinery provided by *Act* - Board also rejecting Carpenters' assertion that persons employed on application date were "labourers" and not "carpenters" - Registrar directed to arrange for ballots to be counted - Unfair labour practice complaint dismissed

PETER KIEWIT SONS CO. LTD.; RE L.I.U.N.A., LOCAL 837; RE C.J.A., LOCAL 38; RE ONTARIO PROVINCIAL DISTRICT COUNCIL..... 881

Unfair Labour Practice - Discharge - Discharge for Union Activity - Probationary employee discharged shortly after engaging fellow employees in discussion about possibility of organization of union - Board not persuaded that no part of discharge was in response to news of potential union drive - Complaint upheld - Reinstatement with compensation and posting ordered

FABRICLAND DISTRIBUTORS INC.; RE BREWERY, MALT & SOFT DRINK WORKERS, LOCAL 304 836

Unfair Labour Practice - Duty of Fair Representation - Complainant arguing that union's failure to process overtime grievance to arbitration violating the *Act* - Board finding that union considered grievance on its merits, taking into account relevant matters, and acted reason-

XII

ably in coming to its decision that grievance would not succeed at arbitration - Complainant dismissed

SMITH, PERINO; RE CAW-TCA CANADA LOCAL 112 & THE DE HAVILLAND AIRCRAFT COMPANY OF CANADA / A DIVISION OF BOEING OF CANADA LTD.

912

Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Reconsideration
- Board dismissing complaint because complainant failed to appear at scheduled hearing -
Complainant seeking reconsideration on grounds that he mistakenly believed hearing was
scheduled for another date - Board's notice of hearing clearly indicated date of hearing and
received at least a month in advance of hearing date - Board finding complainant negligent
and holding that non-attendance resulting from negligence not a reason to reconsider deci-
sion - Application for reconsideration dismissed

BUCHIN, HOWARD; RE TORONTO CIVIC EMPLOYEE'S UNION, LOCAL 43; RE
THE MUNICIPALITY OF METROPOLITAN TORONTO

815

0922-90-R United Steelworkers of America, Applicant v. **AluminArt Products Limited**, Respondent v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Intervener

Certification - Pre-Hearing Vote - Representation Vote - Notices and ballots provided by Board in English and French - Applicant union alleging widespread confusion surrounding taking of vote - Applicant requesting that Board provide voting materials, including ballots, in Spanish and Punjabi and that new vote be held - Board reviewing and explaining its policy with respect to translation of its documents - Request for re-taking of vote denied

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *M. Rozenberg* and *B. L. Armstrong*.

APPEARANCES: *Michael Gottheil*, *Jonathan Eaton* and *Brando Paris* for the applicant; *David C. Turner* and *Brian McLean* for the respondent; *L. Steinberg* and *F. Da Silva* for the intervener.

DECISION OF THE BOARD; July 9, 1991

1. This is an application for certification in which the applicant, United Steelworkers of America, seeks to displace the intervener, Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, as bargaining agent for employees of the respondent AluminArt.

2. The application requested the taking of a “pre-hearing vote”, and the Board accordingly proceeded to make the arrangements for a representation vote in which employees would be asked whether they wished to have the applicant or the intervener trade union represent them in their employment relations with the respondent. At the meeting convened by a Labour Relations Officer with the parties for that purpose, the intervener advised the Officer that as a large percentage of employees in the bargaining unit spoke either Spanish or Punjabi, it was requesting that the Board provide voting materials, being the Notice of the Taking of a Vote together with the ballots themselves, in those two languages, in addition to the normal languages of English and French. Upon being advised by the Officer that the current practice of the Board was to issue such documentation in English and French only, the intervener immediately wrote to the Board, by letter of July 20th, 1990, re-stating its request. The vote had been scheduled to take place on August 3, 1990, and the Board proceeded to conduct the vote on that day, without providing the additional material in Spanish and Punjabi requested by the intervener. At the same time, however, the Board directed that the ballot box be sealed, in order to protect the intervener’s opportunity to make further submissions to the Board on the issue that it had raised. Following the taking of the vote, the intervener wrote to the Board (as did the respondent employer) expressing its concern over “widespread confusion” surrounding the taking of the vote, and requesting that the Board direct the holding of a new vote, to be held only after the Board had issued the documentation in Spanish and Punjabi that had been requested by the intervener at the outset. The Board thus scheduled a hearing to entertain the submissions of the parties as to whether the Board should consider disregarding the representation vote taken on August 3, 1990 in this matter on the basis that notices and ballots were provided by the Board in no language other than English or French.

3. At the hearing the intervener reaffirmed its position that the vote held on August 3, 1990 ought to be disregarded and the ballots not counted. The intervener noted that it was the incumbent bargaining agent, and that it had raised its concerns over language with the Board at the first opportunity, being the meeting with the Officer to make arrangements for the vote. Counsel indicated that it was his understanding that some 55 to 60 per cent of the bargaining unit have diffi-

culty with the English language, and that their primary language is either Spanish or Punjabi. Counsel indicated that the intervener accordingly had made the request that it did so that there could subsequently be no issue, as counsel submits there now is, regarding possible confusion over the vote. In that connection counsel advised that the intervener was prepared to call the evidence of at least 10 to 15 people plus its own scrutineer to indicate that there was widespread confusion at the vote as to what was taking place, and as to what the ballots meant in terms of where to put the mark if an individual supported one union or another. Counsel acknowledged that there may be persons of other nationalities in the bargaining unit who might experience similar difficulty in dealing with the English language, but stressed that the intervener was not suggesting that the Board was required to provide a translation for each and every such group. Rather, the Board would be justified in limiting such assistance to instances "where the numbers warrant it", as reflected, for example, in the government's approach to the translation issue under the *French Language Services Act*, and as the Board itself has on occasion seen fit to do in the past (e.g., the Board's decision in the *Ontario Bus Industries Inc.* case, [1989] OLRB Rep. Nov. 1115, and the remedy granted therein). Asked whether such an approach would not require the Board to delay the outcome of the vote by scheduling a hearing each time parties failed to agree on the issue of "where the numbers warranted", counsel responded that the Board could avoid that by establishing a policy as to where it is the Board considered it appropriate to draw the line, and to make that policy widely known in advance. And in any event, counsel emphasized, the facts in the present case are "special", in that the parties in advance had identified for the Board the appropriate translations that were required, and the Board would have been entitled to rely upon the parties' assertions in that regard. Asked what the Board could be expected to do if subsequently faced with an objection from an individual of a nationality other than those identified by "the parties" in attendance at the vote-arrangements meeting, counsel replied that it was the job of the Board to "draw lines", and that that was something that Courts and tribunals are required to do all the time. In summary, counsel for the intervener again stressed that the intervener's position was not that the Board ought to assume the position of a "guarantor" of the language comfort of each and every employee in the bargaining unit, but rather that the present case simply involved a good-faith request put forward by the parties in advance of the vote on the basis of some obvious numbers, in the simple interest of avoiding the kind of confusion that the intervener says has arisen in the case at hand. While the intervener acknowledges that the parties themselves are able to take steps to assist employees to overcome any such confusion, that fact, in counsel's submission, does not remove the responsibility resting on the Board itself in a case such as the one now before us.

4. The respondent employer supported the position taken in this matter by the intervener trade union, reiterating the point that the language issue had in fact been identified for the Board well in advance of the vote, and that it appeared from its own observations that a substantial amount of confusion arose at the vote as a result of the Board's failure to act upon the request of the intervener. Counsel for the respondent in addition argued that the matter had to be looked at from the point of view of a fundamental human-rights issue, and that the failure to provide the translations requested amounted to a violation of several sections of the *Ontario Human Rights Code*. In particular counsel pointed to section 3 of the *Code*, which reads:

Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

and submitted that the vote in question represented a kind of "contract" with the employees affected, being a vote which would determine their collective-bargaining relationships into the future. Counsel referred also to section 4 of the *Code*, which reads:

4.-(1) Every person has a right to equal treatment with respect to employment without discrimi-

nation because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

noting that the section specifically refers to “employment”. Counsel cited section 5 of the *Code* as well, which reads:

Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

submitting that “membership in a trade union” is exactly what the current matter is all about. Finally, counsel referred to section 10:

10.-(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 16, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

submitting that this is a case of at least “constructive” discrimination, and to section 46:

46.-(1) This Act binds the Crown and every agency of the Crown.

(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act.

(3) Subsection (2) does not apply to an Act or regulation heretofore enacted or made until two years after this Act comes into force.

as establishing the paramouncy of the *Human Rights Code*’s provisions. Counsel noted that in none of the earlier cases decided by the Board was this human-rights issue under the *Code* put before it, and that the Board would now be considering it for the first time. Counsel conceded that the kind of translation assistance being sought from the Board did not form the practice in either provincial or federal general elections, but submitted, firstly, that the “contract” with employees in a Board representation vote was a more fundamentally and immediately affecting one for employees than

in a general election, and secondly, that provincial and federal election practices may simply be in violation of human-rights legislation as well.

5. Dealing with the argument made by the respondent employer first, the applicant union commented that if the practice of the Board to provide notice of the taking of a vote and ballots in English and French only was a violation of the *Human Rights Code*, then presumably a posting of *any* notices to employees solely in that form would be a violation of the *Code* as well. And, counsel noted, there is nothing in the *Code* to limit its protection to large or “predominant” groups, but rather the protections, if they were to apply at all, would presumably apply to every individual whose native language was not English or French on an equal basis. In summary, counsel submitted, the logical extension of the employer’s argument was that every individual is entitled to receive every document from every government agency in his or her own native language, and that, counsel submitted, simply could not be the case - particularly since the agency in many instances would not even *know* what the full extent of the language requirements might be until after the event. Apart from those practical considerations, however, counsel for the applicant submitted that the taking of a representation vote could not in any event be stretched into being a “contract” with employee voters. Rather, what the representation vote does is to determine on the basis of employee wishes who the “bargaining agent” will be, and that bargaining agent is thus given the authority to enter into a “contract”, or collective agreement. Applicant counsel added that he found it interesting, in light of the argument the respondent employer was now making, that neither the respondent nor the intervener had ever seen fit to translate the terms of their actual collective agreement, or of its dental plan, etc., into Spanish or Punjabi - nor the paycheques or pay stubs emanating from the employer thereunder.

6. With respect to the main ground of argument put forward by the intervener and joined in by the respondent, the applicant took the position that the Board had made a decision with respect to what its practice would be in this regard, and that the Board had a statutory right to determine such matters affecting its own process. With respect to the observations of “widespread confusion” now asserted before the Board by the employer, the applicant noted that the “Waiver of Objection” form was signed by the employer’s scrutineer without reference to any problems concerning the taking of the vote. The applicant noted that even if the intervener’s estimates on the numbers of Spanish and Punjabi-speaking employees in this bargaining unit were assumed to be correct, there were, to the applicant’s own knowledge, groups, albeit of a lesser number, of Vietnamese and Portuguese-speaking employees in the bargaining unit as well, and that an indeterminate number of individuals from *other* backgrounds than these mentioned might be found to exist as well. None of that, applicant counsel points out, means that those employees are unable to function in English as well, and notes that the Board’s processes would grind to a halt if it were to be said that the Board had an obligation in every case to inquire into the background and language facility of every employee in the workplace, so that translation of Board documents could be provided accordingly. And quite apart from the question of national background, counsel adds, there are in fact a regrettable number of people born in *Canada* who nonetheless have difficulty with literacy in the English language. But that, once again, does not mean that such persons are incapable of understanding what is going on. Indeed, while the intervener asserts that it is in a position to bring 10 to 15 people before the Board to say that there was “widespread confusion” as to what was taking place, the applicant noted that the Board had received from it in advance of the hearing a “petition” signed by approximately 25 of the employees of Spanish or Punjabi background who assert that they knew *exactly* what was going on. So where, counsel asked rhetorically, after all the evidence was heard, would that leave the Board?

7. Recognizing all of that, counsel submits, the Board has made it clear in the past that it is simply not prepared to enter into that kind of an inquiry. See *Image Painters L.M. Inc.*, [1988]

OLRB Rep. Aug. 807; *Northfield Metal Products Ltd.*, [1989] OLRB Rep. Jan. 57. Rather, the Board for many years has, for sound practical reasons, made it clear that informing one's self of the meaning of Board documents is simply one of the ways in which individuals not conversant with the English language are required to adjust to or cope with the demands of everyday life. See *IlSCO of Canada Limited*, [1973] OLRB Rep. May 221; *Javid Construction Management Limited*, [1988] OLRB Rep. Sept. 906; and in particular the *Federated Building Maintenance Company Limited* case, [1979] OLRB Rep. Oct. 974, at paragraph 13. Such persons, counsel submits, simply have to find ways to inform themselves, and the applicant, for example, being aware of that just as the other parties in the present case were, took the steps it itself considered appropriate to provide assistance if required. As for the intervener's reference to the *French Language Services Act* as a "guide" to what the Board should do on the broader issue, the applicant submits on the contrary that what that Act represents is the Legislature of the province having put its mind to the question of language rights specifically, and having decided, based on whatever considerations, that the right to be served in a language other than English in this province will extend only to the language of French. Indeed, given the inherent potential for *delay* in proceedings before this Board that a different approach to the language issue would obviously involve, the applicant queries why *any* trade union, like the intervener, would take the position that the intervener has before the Board in the present case. As a corollary to that, counsel notes with interest that in the recent Board case of *Admiral Linen Supply Limited*, [1989] OLRB Rep. Feb. 90, this same union (the intervener) took exception to the complaint of the employer that membership cards being used in the application for certification (for a multinational workplace) were printed only in English, with the employer arguing that the Board had to find some means to satisfy itself that all of the employees who signed cards in the case would have understood what it was they were doing. That, the applicant submitted, is what the present case effectively comes down to as well, and in summary the applicant asserts that no more reason exists to question the validity of the representation election conducted amongst the employees in this bargaining unit on August 3rd, than it does to question the results of the general election which was held in the province at large on September 6th of this year.

8. On the narrower ground put forward by counsel for the intervener that the present case involves the special circumstance of an "agreed" request by the parties, applicant counsel notes, to begin with, that the intervener's characterization is not accurate. Applicant counsel asserts that the intervener at the Officer's meeting simply stated its desire that the voting materials be provided to the parties in Spanish and Punjabi as well, and on being advised by the Officer of Board practice in that regard, the parties at that stage did not pursue the matter further. In fact, if the matter *had* been pursued further, the applicant notes, it would at the very least have argued that it was appropriate to have the ballots translated into Vietnamese and Portuguese as well, and were that to have been the case, the applicant queries what the level of confusion might have been at the polls with a ballot containing a version of the Board's instructions in *six* languages rather than the standard two. And even then, counsel adds, the Board would not have thereby been guaranteed that all possible persons who might raise a claim over the language issue would necessarily have been covered, so that the Board might still have found itself faced with precisely the same kind of issue subsequent to the vote as it is now. And what, counsel asked, would the Board be expected then to do with the case had, for example, the two unions been separated in the balloting by a single vote, and two employees, of, for example, Armenian background, come forward to advise the Board that, because of their difficulty with English, there was some confusion in their minds as to what they were doing when they cast their ballots. Having said all of the foregoing, however, counsel for the applicant reminded the Board that the representation vote of August 3, 1990 had been carried out in accordance with the preceding decisions and directions of the Board, and that the only issue that the Board now had to determine was whether there was anything before it which would cause the Board to refuse to accept that vote as a valid one.

9. After considering the aforesaid submissions of the parties, the Board on September 4, 1990 issued a direction to the Registrar by way of endorsement which read as follows:

The representation vote of August 3rd was conducted by the Board in accordance with its current practices respecting the translation of Board documents. All parties were aware that that would be the case in advance of the holding of the vote. The request for a re-taking of the vote is denied, and the Registrar is directed to make the necessary arrangements forthwith for the unsealing of the ballot box and the counting of the ballots.

Full written reasons will issue in this matter.

The Board did, nonetheless, consider this to be an appropriate case in which to review its current practice on the issue, and has now had a full opportunity to do so.

10. The Board has received requests for translations of forms, notices, etc. on a number of prior occasions. For example, in *ILSCO of Canada Limited*, [1973] OLRB Rep. May 221, the employer requested that notices for the taking of a representation vote be printed in Portuguese in addition to English. At paragraph 9, the Board stated:

The Board is not prepared to accede to the respondent's request in this regard. The parties will have to assume the responsibility of explaining the nature of these proceedings and the vote arrangements to the employees who are unable to understand the notices published in the form of ballot used pursuant to the Board's Rules of Procedure and Regulations. The Board cannot accept responsibility for the inability of any person who is entitled to vote to read and understand the English language any more than the Board can accept responsibility for employees who are illiterate and are unable to read in any language whatsoever. The Board is required to follow the form of notices and ballots which are set out in the Board's Rules of Procedure and Regulations, all of which documents are in the English language. If the parties have any real concern about the ability of employees to understand the nature and intent of such documents they are at liberty to agree to publish an appropriate translation of the documents or otherwise explain to the employees the nature and procedure of the representation vote. It has been the Board's experience over a great many years that no real hardship is created by the use of the English language in the publication of the Board's notices or in representation votes and the Board is satisfied that the use of the English language has permitted the Board to ascertain the true wishes of employees in all such representation votes.

11. In *Federated Building Maintenance Co. Ltd.*, [1979] OLRB Rep. Oct. 974, the employer alleged employees were denied natural justice because the notice of representation vote was not printed in Portuguese, which was the common language of the workplace. Notwithstanding whether it could properly be raised by the employer the Board examined the issue. The Board repeated its conclusion that there had been no apparent hardship suffered by employees through its historical practice. At paragraph 13 the Board stated:

Obviously there are numbers of employees in the Canadian workplace who, by reason of their national origin, are not able to read or write either English or French. They are nevertheless usually quite able to function within the mainstream of everyday life in Canada. Whether they deal with commercial interests or with their government, they generally expect to do so in one of the two official languages of Canada. The same is true in their dealings with the courts or with public administrative tribunals. Immigrant Canadians generally obtain and can reasonably be expected to obtain, the assistance necessary to enable them to respond to process issuing from a court or tribunal.... In the Board's experience employees who are not fluent or literate in English do not fall within a special class of disadvantaged workers. While the Board has always made use of translations in the receiving of evidence, it does not presume that immigrant Canadian employees are less able than others to inform themselves and assert their rights under the *Labour Relations Act*.

12. In *Image Painters L.M. Incorporated*, [1988] OLRB Rep. Aug. 807, the employer had sought a hearing regarding certification on the basis that some employees did not understand the

nature of the certification process as a result of their inability to understand English. The Board followed the decision in *Federated Building Maintenance Company Limited*, *supra*, in determining that the employer did not raise grounds which would cause the Board to hold a hearing into the application rather than certify the union without a hearing in accordance with section 102(14) of the *Act*.

13. Similarly, in *Javid Construction Management Limited* [1988] OLRB Rep. Sept. 906, where the objecting employees requested notices for representation votes to be printed in Italian and Portuguese, the Board declined to issue such notices. The Board stated at paragraph 6 that "... it has not been the practice of the Board to post such notices in these languages. It has not been the experience of the Board that employees who are proficient in neither English nor French have been unable to exercise their rights under the *Act*".

14. In *Admiral Linen Supply Limited*, [1989] OLRB Rep. Feb. 90, (the case involving the intervener referred to by the applicant) the employer argued against certification without a vote despite the fact more than fifty-five percent of its employees in the bargaining unit were members of the applicant union, on the ground that the employees did not understand English but rather Portuguese. The Board declined to order a representation vote on the grounds given in *Javid*, *supra*, and *Federated Building Maintenance*, *supra*, as articulated, for example, in *International Chinese Restaurant* [1977] OLRB Rep. Oct. 688 at 690:

It may well be that members of the bargaining unit may not comprehend the English language. Nevertheless, it does not follow that an applicant for membership did not comprehend the significance of writing his signature on his membership card. For example, he may have had a bilingual person who acted as a collector, or a colleague in the bargaining unit, explain the nature and purpose of the applicant's organization campaign.

15. This review indicates that the Board has drawn a number of conclusions concerning the use of languages other than Canada's official languages. First, employees who are not proficient in the English language are still required and able to function in society, including the processes of the Board. Second, the responsibility to ensure such employees understand the certification procedure where someone feels there may be a problem, is that of the parties. The arguments presented by counsel for the respondent and intervener do not justify a repudiation of the Board's conclusions.

16. The Board is not insensitive to the difficulties persons not literate in English may experience in Canadian society, nor do we wish to see employees' rights to meaningfully participate in processes that affect them unnecessarily impeded. But there are other concerns the Board must balance in carrying out its mandate under the *Act*, and in certification proceedings in particular parties in the community are well aware that very often "justice delayed is justice denied". The positions here advanced by the intervener, and the employer presumably on behalf of its employees, would mean that (quite apart from "translation time" itself) no certification process could proceed without either the Board exhaustively determining in advance what languages are required (or claimed to be required) in a given case, or having the result subject to challenge and litigation on "language" issues after the processing and determination of the application have been completed. In response to the intervener's suggestion of a "bright-line" test whereby the Board would simply establish in advance a numerical "cut-off" point to be applied to all cases, once one moves beyond the specific mandate of the *French Language Services Act*, it is not obvious where the Board would derive the authority to decide what number or proportion of employees in a workplace asserting a right to accommodation of alleged language difficulties is "sufficient" to warrant such accommodation.

17. It should be noted that the Board does now publish general information on the rights of employees in a number of languages, and is constantly monitoring the requests for assistance in making decisions as to when and into what languages that list ought to be expanded. On the more narrow point of the casting of ballots in a Board-directed vote, the Board well in advance of the "election" day distributes for posting in the workplace not only its detailed "Notice of Employees of the Taking of a Vote", but also a sample of the *actual* ballot as well, with the appropriate party names filled in. In the present case, for example, the ballot that was posted in advance provided:

Make an "X" in the circle opposite your choice IN YOUR EMPLOYMENT RELATIONS WITH / Inscrire un "X" à côté de votre choix POUR ASSURER LES RELATIONS DE TRAVAIL AVEC	
ALUMINART PRODUCTS LIMITED	
DO YOU WISH TO BE REPRESENTED BY / DÉSIREZ-VOUS ÊTRE REPRÉSENTÉ PAR	
TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351	<input type="radio"/>
OR / OU	
UNITED STEELWORKERS OF AMERICA	<input type="radio"/>

Thus any employee who requires assistance with interpreting or understanding the choice he or she is going to be called upon to indicate, has ample time in advance to make whatever inquiries he or she feels are necessary. In this regard, we might note as an aside, the Board's processes would appear to compare favourably with election procedures at the various levels of government as a whole.

18. With respect to the employer's arguments advanced on behalf of the employees under Ontario's *Human Rights Code*, we do not accept (nor, as noted in the cases quoted earlier, does our experience bear out) the simple equation the employer seeks to draw between language disability and "ethnic origin". But even if we did, we are not persuaded that the matter at issue here would fall within the *Code's* intended meaning of "contract", of "membership in a trade union", or even of "employment" itself, as argued by the employer. Indeed, it appears to us that the whole line of argument developed by the employer under the *Code* in this case would dramatically affect

the status of linguistic disability in society generally, and we are not prepared to embrace such a change without specific legislative guidance to do so.

19. Having reviewed the Board's long-standing policy with regard to the translation of its documents, therefore, the Board has concluded that neither its experience with that policy nor the arguments advanced by the intervener and employer in this case are such as to cause it to balance the competing considerations under the Act in a different way than it has found it necessary and appropriate to do in the past, and the Board accordingly here reaffirms its policy in that regard.

0767-91-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. Associated Toronto Taxi-Cab Co-Operative Limited, Respondent

Certification - Employee - Pre-Hearing Vote - Union applying for pre-hearing vote - Parties disputing voting constituency and respondent taking position that no individuals set out on its lists employed by it - Respondent requesting that Board decline to order vote until hearing held to hear evidence with respect to its position - Board seeing no reason to depart from its normal practice regarding pre-hearing votes - Board directing vote and that ballot box be sealed - Registrar directed to list matter for hearing on all outstanding issues after vote held

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. A. Rundle* and *J. Redshaw*.

DECISION OF THE BOARD; July 12, 1991

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. The parties are in dispute with respect to whether a number of employees are to be included or excluded in the bargaining unit and the voting constituency. In addition, the respondent takes the position that none of the individuals set out on its lists are employed by it.
4. The respondent has also requested that we reserve our discretion to decline to order a vote until a hearing has been held to hear evidence with respect to this latter position. In the alternative, it wishes to have an opportunity to file written submissions in this regard.
5. In *Kirouac Contracting Ltd.*, [1987] OLRB Rep. Oct. 1262, the Board reiterated its views on the purpose and application of section 9:

The purpose of a pre-hearing vote is to provide a "quick vote" procedure, and as a result, it is critical that the vote not be delayed by litigation. As the Board said in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316:

5. It is axiomatic that in labour relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of

the pre-hearing, or “quick vote” procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

To accommodate the need for expedition but also provide parties with the opportunity to have a hearing on contested issues which may arise, the scheme of section 9 contemplates the deferral of decisions on contentious matters until after the vote. Thus the Board is required only to strike a voting constituency and make an assessment with respect to whether an applicant has the *appearance* of membership support of not less than 35% before directing the vote. It is not until after the vote that the Board determines the appropriate bargaining unit and assesses the *actual* level of membership support. Where there are matters in dispute, the Board can seal the ballot box until the parties have had an opportunity to present their cases in this regard.

7. This approach has been more fully developed in the Board’s jurisprudence under section 9. While a wide variety of contested issues have arisen in cases where pre-hearing votes have been requested, the Board pointed out in *The International Nickel Company of Canada*, [1961] OLRB Rep. Dec. 324 that it is implicit in the use of the term “pre-hearing representation vote” that a vote be taken before a hearing is held. As a result, such disputes will be deferred until after the vote. To protect the parties’ rights to have their differences adjudicated by the Board and still maintain the expedition which is integral to the pre-hearing votes process, the Board will structure the vote and segregate ballots to try and ensure that the vote will be meaningful in any event of a dispute. The Board has handled many kinds of disputes in this fashion, including questions relating to whether an applicant has trade union status, disputes with respect to employee status and voter eligibility, and a variety of problems associated with the composition of the bargaining unit.

8. It is clear from the scheme of section 9 and the Board’s jurisprudence that by directing the vote, the Board makes no assumptions about the ultimate disposition of the application. Thus, for example, should an applicant subsequently be found not to have actual membership support of at least 35%, the application will be dismissed, regardless of the fact that a vote has been held. Similarly, an applicant who subsequently fails to establish its status as a trade union will gain nothing from the pre-hearing vote. This scheme permits the vote to be taken despite the fact that a number of significant issues may be in dispute.

[emphasis in the original]

6. In this case there is no reason to depart from the Board’s normal practice as the respondent’s interests are adequately protected by the procedure outlined above. If the respondent wishes us to reconsider our decision in this regard, it must file written submissions in accordance with Practice Note #17 on or before July 19th, 1991.

7. In accordance with that practice and consistent with the Board’s jurisprudence in *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602 and *Kirouac Contracting Ltd.*, *supra*, we conclude for the purposes of directing the vote under section 9(2) that on the basis of the applicant’s position it appears that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

8. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

all employees of the respondent operating under the roof sign “Co-Op” in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dis-

patchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/leasees.

9. All those listed on the voters' list will be eligible to vote. However, in light of the fact that the above-noted disputes may affect our eventual determination with respect to the actual level of support under section 9(4), the ballot box will be sealed and the ballots not counted except upon the agreement of the parties or by further order of this Board. In addition, the ballots of all those individuals whose eligibility to vote is in dispute shall each be segregated and remain uncounted except upon the agreement of the parties or by further order of this Board.

10. The parties are also in dispute as to whether the respondent should be permitted to add or delete names from the lists of individuals alleged to be employees after the date of the Labour Relations Officer's meeting with the parties. The ballots of any voters contested as a result of this dispute will also be segregated and remain uncounted except upon the agreement of the parties or by further order of the Board.

11. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

12. The parties are also in dispute with respect to certain aspects of the vote arrangements. That dispute is referred to the Registrar for resolution. In addition, the Registrar is directed to list this matter for hearing on all outstanding issues after the vote is held.

0749-91-R Ontario Public Service Employees Union, Applicant v. Avenue II Community Program Services (Thunder Bay) Incorporated, Respondent

Bargaining Unit - Certification - Whether "home support workers" employed by social service agency ought to be excluded from all-employee bargaining unit - Board rejecting employer argument that nature of home support workers' responsibilities make them inappropriate for inclusion in any bargaining unit - No compelling evidence of incompatibility between home support workers and other bargaining unit employees - Home support workers included in bargaining unit - Certificate issuing

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *Nick Coleman* and *Vic Williams* for the applicant; *Alan Jones*, *J. V. Boeckner* and *Allan McKittrick, Jr.* for the respondent.

DECISION OF THE BOARD; July 11, 1991

1. This is an application for certification in which the parties have reached agreement on all aspects of an appropriate bargaining-unit description, save for the question of the inclusion or exclusion of the four individuals described as "Home Support Workers". The parties were advised at the meeting with the Labour Relations Officer that the applicant was in a certifiable position regardless of the outcome of this single issue in dispute.

2. Funded by the Ministry of Community and Social Services, the respondent employer is an agency whose goal is to assist and allow individuals with at least some form of developmental

disability to become integrated into the community in all aspects of their lives. There are virtually no services provided to the client group (referred to as “members”) at the office of the agency. The agency arranges the leasing of residential accommodation suitable for two or three persons throughout the community, and places a member in such accommodation, along with a Home Support Worker and normally one other member. The cost of the lease is undertaken by the agency, with assistance from the member or members where they have the means to do so.

3. The bargaining unit applied for by the applicant is composed of 34 persons, that total being made up of one receptionist, one bookkeeper, 28 Support Workers, and the four Home Support Workers who are the subject matter of the present determination. It is the responsibility of the Support Workers to develop programs for the “members” of the agency in response to identified needs, and to then implement that program through the training of the individual involved. The Support Workers report to supervisors or “Co-ordinators”, and are required to attend case planning sessions to report on how matters are proceeding with respect to members assigned to them. The majority work a 37¼-hour week, although the “Support Workers” group includes some part-time workers as well. Daily hours are worked out with the Co-ordinator, around the core hours of 9 to 3. Support Workers are notionally on 11-month contracts, for funding purposes, and towards the end of each contract undergo a formal evaluation process. They are paid a salary which works out to approximately \$24,000 a year, and can opt into a 50%-paid employer fringe-benefit package. They also receive vacation and sick leave. The “Co-ordinators” not only carry out the aforesaid performance appraisals, but also are responsible for ensuring that the Support Workers are “at work” according to their schedule.

4. The function of teaching the members the basic skills of residential living rests, not with the Home Support Worker, but with Support Workers assigned to the Residential program, who attend at the residence during daytime hours to prepare the member in such matters as personal grooming. Support Workers in another program, the Vocational program, have the responsibility for preparing the member for integration into the work force, and carry that responsibility out primarily by attending with the member at the place of employment and sitting by the member’s side to assist in the transition. A third program, Life Skills, is carried out by a further group of Support Workers who attend with the member in the community, for example, at their bank, to teach those skills at the actual site at which they are applied. The Home Support Worker, by contrast, is simply required to be *at* their place of residence during the evening and night-time hours as negotiated, and their specific responsibilities are far more limited. The employer’s evidence is that it is not the responsibility of a Home Support Worker to teach life skills to the members with whom they reside, other than to accompany them on the weekly shopping trip to buy groceries for dinners, the one common meal of the day to which all members of the household contribute both money and suggestions for the menus. The Home Support Worker negotiates his/her hours of being “at home” in the residence with the Co-ordinator, but essentially the “core” hours of 10:00 p.m. to 8:00 a.m. are required to be covered. The idea of the program, and in particular its residential component, is that the member is free to live his/her own life; however, the Home Support Worker has a silent alarm in the worker’s bedroom which is triggered by the front door being opened, and it is the responsibility of the Home Support Worker to ascertain the reason why any member is leaving the residence in the evening. Some members are considered perfectly competent to make their way out for “a stroll” on their own, while others would be considered seriously at risk, and the employer makes it clear that it would hold the Home Support Worker severely accountable if one such member had been permitted to leave the apartment, without monitoring by the Home Support Worker, and a call having gone to the agency for back-up support if necessary. Apart from that, however, the apartment is the normal place of residence of the Home Support Worker as well. The Worker is expected to carry out a normal daily routine, including sleeping at night, and hopefully will have a job, or be enrolled in school, during the daytime hours.

5. The Home Support Worker's contract with the agency notionally covers 365 days a year, with the emphasis being on maintaining stability in the relationship developed within the shared place of residence. Obviously replacement coverage for the Home Support Worker does have to be arranged from time to time during the course of the year, however, and the Home Support Worker has the option of either advising the agency of such need and relying upon the agency to provide the coverage, or of arranging the coverage directly with an individual who has previously been approved by the agency. It is not disputed that the most common way of dealing with such "coverage" needs is through the use of the "regular" Support Workers already employed in the agency's program. Conversely, the Home Support Workers are looked to by the agency as a ready supply of experienced back-up personnel in covering for vacancies in the "day" units, with two of the four Home Support Workers currently being used on an *ad hoc* basis and paid at an hourly rate, while a third is in fact a "regular" part-time day worker in the Life Skills unit, carrying out all of the responsibilities of a Support Worker in that unit, including the development of the individualized programs themselves. The assignment of "regular" staff into the residence in fact provides the employer with the one source of evaluation available to it with respect to the relationship existing between a Home Support Worker and his/her co-tenant members, and if reports from Support Workers indicate an inappropriate situation, the agency will take steps to remove the member or members from the care of that particular Home Support Worker.

6. The Home Support Workers sign exactly the same form of contract for "full-time" employment as do the "regular" Support Workers. That form of contract provides for the insertion of a "probationary period", and such insertion has in fact been made for a three-month period with respect to the contract filed for at least one of the current incumbents. The "Contract Period" is also set out within this standard form, and the contract closes with the words:

"I hereby accept the above-noted conditions of employment."

There is an additional document which sets out further guidelines for the Home Support Worker, and which is agreed to form part of the contract of employment. This further document provides:

AGREEMENT BETWEEN AVENUE II AND THE HOME SUPPORT WORKERS (HSW)

The HSW will assist fellow tenants with daily routines as outlined in the Supported Independent Living Program duty roster.

These may include but are not restricted to: dining; dressing, housekeeping; medication; leisure; recreation; laundry; grocery shopping; and menu planning.

The HSW will act as a correct role model for fellow tenants and participates in SIL program, staff and tenant meetings.

The HSW will be considered as Part time employee of Avenue II.

The HSW will be responsible for his/her portion of household costs (*ie*: food, telephone, rent) and ensures that any decision which affects the income of his/her room mates (*ie*: cable T.V., and so forth) will be discussed with the SILP Component Co-ordinator.

The HSW will be responsible to the SILP Component Co-ordinator, and will perform duties as assigned by that senior staff member. Any disagreement should be submitted to the Executive Director in writing.

The HSW will be in the home during the hours scheduled. If due to circumstances he/she cannot be in the home at the designated time he/she will contact the home 1/2 hour ahead of schedule to inform the SILP staff, tenants, and/or on-call staff members, who may then elect to arrange coverage at the HSW's expense if necessary.

The HSW will identify to the Executive Director, two “backup” individuals who will undergo vetting by Avenue II to determine their qualifications to provide that coverage. The “backup” individual will be paid by the HSW at an agreed rate. Avenue II requires this agreement to be in writing and held on file. Standard forms will be provided by Avenue II. “Backup” individuals should be introduced to other tenants and visit the home at least once a month to interact with the tenants and review changes in program routine for which they may be responsible.

The HSW will safeguard the room mates against loss of their living quarters by ensuring that noise levels due to stereos, T.V.’s etc. are not excessive; physical abuse to the unit is mitigated; and the upkeep of the yard, walkways and so forth are maintained in an acceptable manner.

The HSW agrees to work with his room mates toward providing a normalized housing situation wherein the room mates can move toward a goal of independent living as it applies to their own individual abilities and capabilities.

[emphasis added]

7. The employer argues in support of the Home Support Workers’ exclusion that:

- (1) they are “dependent” contractors; and alternatively,
- (2) if they are “employees”, they are not appropriate for inclusion in this bargaining unit.

While initially put forward as a “community of interest” type of argument, it is clear from the employer’s elaboration that what it really is saying with respect to point #2 is that the nature of the these Home Support Workers and their responsibilities, including, the employer submits, their legal “tenure” as tenants on the residential lease, make them inappropriate for inclusion in *any* bargaining unit. The removal of services of this particular group, the employer submits, would create such difficulties for the employer that the normal balance sought to be struck through collective bargaining under the *Labour Relations Act* could not be achieved, and it is therefore simply not appropriate that the organizational rights arising from that Act be found to apply in this situation. The employer queries whether *any* collective agreement negotiated for these individuals could properly take into effect the conditions and goals under which the Home Support Workers are expected to work, and whether the principles of any “unionized” workplace could be compatible with the philosophy of this unique developmental program.

8. Certainly the evidence does disclose some obvious differences between the “Home Support Workers” and the broader group of “Support Workers” essentially making up the remainder of the bargaining unit. The latter group performs a much more active, “teaching” role, “working” a day shift, and the qualifications sought are generally at a minimum the Developmental Service Worker certificate, or its equivalent. In comparison, the emphasis on hiring “Home Support Workers” is more in the nature of identifying a “caring” kind of person who will also provide an appropriate role model in carrying out his or her own daily life. In return the agency, as explained, provides the Worker with a place of residence rent-free, together with a stipend of \$1,000 a month. Home Support Workers are not invited to participate in the fringe-benefit programs offered the “regular” staff by the employer, although they are permitted to elect to have the employer make the normal deductions for Unemployment Insurance, Canada Pension Plan and Income Tax, and all four of the existing Home Support Workers have made that election.

9. The employer in its argument refers in particular to the following passage from the *Hospital for Sick Children* case, [1985] OLRB Rep. Feb. 266, wherein the Board indicated that in its view, the question of an “appropriate” bargaining unit can effectively be reduced to “a relatively simple question” as follows:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour-relations problems for the employer?

10. The Board very much agrees with that essential statement of the issue, but considers the employer to have misapprehended its impact in the present situation. The *Labour Relations Act* contains no exclusion from the application of its rights for persons in the category of the present “Home Support Workers”, and the employer’s underlying position that these individuals not be permitted to participate in collective bargaining *at all* is simply untenable. Nor does the lack of any restriction on how these individuals use their day-time hours bring them within the category of what the Board might conclude to be “dependent contractors”, as opposed to “employees”: all that this arrangement demonstrates is that these individuals are in the position of carrying on a second, “day” job if they choose to. The only question for the Board, therefore, is whether this small group of four employees of the agency are to be set apart on their own from the otherwise all-inclusive group of employees of the agency for whom the applicant has indicated its willingness to act as bargaining agent. And for the Board to come to that kind of a conclusion, the evidence pertaining to incompatibility and community of interest would have to be compelling indeed.

11. And clearly it is not. Rather, all that the evidence appears to demonstrate is that there are two different classifications, being Support Workers and Home Support Workers, employed within the program of the agency, each attracting the terms and conditions of employment appropriate to their responsibilities and work context. But the applicant in its submissions acknowledges that. Beyond that, however, the extent of the cross-over in practice between the two groups is indicative of their overall community of interest, skills and experience, and indeed, the final paragraph in the above set out “agreement” between Avenue II and the Home Support Worker underscores the extent to which the role of the Home Support Worker is but one of the several components going to make up this unified and highly integrated program of development. And, as can be seen, the very limited opportunity for direct supervision by the employer is not confined to the persons utilized in the capacity of Home Support Workers, but rather is a common attribute of a program in which the bulk of the performance of an employee’s job is carried out in “real-life” settings, away from the head office premises of the agency.

12. As for the issue of the lease, we note that, while the employer’s evidence was that it believes there might still be in existence leases to which the Home Support Worker him or herself was an actual signatory, none such were produced in evidence. On the only lease which *was* produced, only the agency and the member appear as signatories, undertaking the obligations of the lease. The Home Support Worker is simply identified as that, and thus as being one of the individuals who will be occupying the premises being rented. But even if that were not the case, and the Home Support Worker were in fact a signatory to the lease, we agree with the submissions of counsel for the applicant that that simply raises for the agency legal considerations entirely distinct from the question of whether or not an employment relationship with the Home Support Workers is in existence, or how the Board ought to deal with that relationship. And while such complications do in fact appear on occasion to have provided problems for the agency in moving a recalcitrant Home Support Worker out of the rented premises, it has not prevented the agency from simply removing the members from the care of that Home Support Worker, and of ceasing the payment of salary to the worker from that time forward.

13. On all of the evidence, therefore, the Board is not persuaded that the persons in dispute are anything other than “employees” for the purposes of the Act, or that they ought to be excluded from an otherwise “all-employee” unit of employees engaged to deliver the program of the respondent employer. The Board accordingly finds that all employees of the respondent in the City of Thunder Bay save and except supervisors, persons above the rank of supervisor, students

employed during the school vacation period and persons employed on a cooperative training program with a school, college or university, constitute a unit of employees of the respondent appropriate for collective bargaining.

Clarity Note #1: For the purpose of clarity, the parties agree that supervisor includes neighbours co-ordinator, administrative coordinator, component coordinator living skills, component coordinator vocational and program coordinator.

Clarity Note #2: For the purpose of clarity, the parties agree that the housing coordinator is included in the above bargaining unit.

14. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 17, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

0590-91-G International Union of Operating Engineers, Local 793, Applicant v. Bot Construction (Canada) Limited, Respondent

Collective Agreement - Construction Industry - Construction Industry Grievance - Pick-up agreement binding employer to wage rates and conditions of local contractor's collective agreement - Union alleging breach of collective agreement's travel provision - Board concluding that reference to "employer's yard" in collective agreement means local contractor's yard and not the employer's temporary yard on the job site - Grievance upheld and Board remaining seized with respect to quantification of damages

BEFORE: Susan Tacon, Vice-Chair, and Board Members D. A. MacDonald and C. A. Ballentine.

APPEARANCES: Bernard Fishbein, Lana Kerzner and Graham Steers for the applicant; David C. Daniels and Steve R. Bot for the respondent.

DECISION OF THE BOARD; July 8, 1991

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The parties reached the following agreement on facts.

1. The distance between the McFarland yard and the job site is more than 65 but less than 100 kilometers.
2. The travel allowance referred to in Article 18.1(a) of the McFarland Collective Agreement has not been paid.
3. The applicable collective agreements for this grievance are the

Clarkson/Bot Agreement and the McFarland Agreement as the project is in map area 2 referred to in the Clarkson/Bot Agreement.

4. The job in question is the construction a new interchange at Sir John A. MacDonald Boulevard and the 401.
5. The “yard” at the job site has no permanent buildings, just four trailers. One trailer houses the office and is staffed by full-time clerk and a project manager, Mr. Goody. Another is the mechanical trailer used for storage of parts; two portable welding machines are outside this trailer. Two other trailers are used to store various parts from vehicles and other machines. There are no garage facilities at this location. Repairs are done in the open air. Equipment is also parked in the open air. The site is surrounded by a snow fence. Building materials are stored within the snow fence but in the open air and, finally, there are various surface fuel tanks for the vehicles.
6. The McFarland yard consists of a large office building, a low bay garage (with four to five bay’s) and a high bay garage with an overhead crane. There are permanent welding facilities at this location and a permanent asphalt pit. There are quonset huts and places to park equipment.
7. The respondent has a “permanent yard” in Oakville which replicates the McFarland yard except with respect to the asphalt pit.
8. The applicant is a provincial local with a charter for the Province of Ontario and has approximately thirteen offices throughout the Province. Some of the offices are in fact “sub-offices” of others. Each office operates a hiring hall from which workers are dispatched. The local office in map area 2 is in Belleville. Its jurisdiction is bounded by Gananoque and Highway 32 in the east to Port Hope in the west and to Bancroft in the north but including the City of Peterborough. Mr. Steers has been the business agent in the Belleville Office since 1978; that office operates a hiring hall. Mr. Steers and his predecessors have been involved in negotiating local area collective agreements and, with reference to these proceedings, were involved in negotiating the McFarland and Maguns Agreements. Mr. Steers has not been involved in negotiating other local area collective agreements for other map areas in the Province as shown on schedule “C” of the Clarkson/Bot Agreement.
9. On the date the grievance was filed, the respondent employed six workers in the bargaining unit pursuant to the collective agreement. Those six worked for the respondent an average of ten months per year in the Kingston area for the last three years. Further, the respondent employs another twenty employees who have worked for twelve months per year for at least the last three years on projects throughout Ontario. On the job site in question, the six men and any additional men employed on this site were hired through the hiring hall but on a “name hire” basis by the Project Manager. That manager, Mr. Goody, asked the union for specific individuals and, if they

were available (and they were), those persons would be (and were) hired by the respondent and cleared by the union. All were also resident in map area 2 for purposes of these proceedings.

Documentary material was also filed in evidence on agreement.

3. Based on the above facts, the parties made their submissions which the Board does not regard as necessary to recite herein.

4. In reaching its decision, the Board has considered the agreed facts, including the documentary material and the parties' submissions. The Board considers it appropriate to give its decision with brief reasons.

5. Article 1.5 of the Clarkson/Bot Collective Agreement reads:

1.5 In those areas of the province which are outlined and numbered on the attached map as marked on Schedule "C" where there exists an agreement between and Association of Sewer and Road Contractors and the Union or a dominating agreement between a local Sewer or Road Contractor, the Employer agrees to abide by the *wage rates, vacation, statutory holiday pay, hours of work, overtime, shift premium, benefit plan contributions, training fund contributions, working dues deductions, regular monthly dues deductions, travel allowance, reporting allowance, hiring hall and subcontracting provisions of said agreement.*

[emphasis added]

Schedule "B" of that collective agreement also states:

In those areas of the Province which are outlined and numbered on the attached map marked Schedule "C", where there are established Agreements between Contractors and the Union covering MTC work, structures and other forms of construction, *the Employer agrees to abide by the wage rates and conditions of said Agreement.*

[emphasis added]

The Agreements referred to in Article 1.5 are as listed below:

Map Area #2

For Roadbuilding work - the McFarland Agreement

For Sewer & Watermain work - the Magnus Agreement.

Schedule "C" indicates that the relevant project is in Map Area 2 and, thus, the Clarkson/Bot Collective Agreement binds the respondent to the "wage rates and conditions" of the McFarland Agreement.

6. This grievance asserts that the respondent has contravened the travel allowance provisions in the McFarland Agreement, specifically, Article 18.1(a) which reads:

18.1 (a) Employees working beyond 65 KM and up to a 100 KM radius from the Employers yard shall be paid twenty dollars (\$20.00) per day expense allowance.

7. Briefly put, the parties joined issues with respect to the interpretation of the reference to "employer's yard" in Article 18.1(a). The applicant asserts that reference can only mean the "McFarland yard" while the respondent contends that the reference point for calculating eligibility for travel allowance within that Article is the "Bot yard" on the actual job site.

8. The Board prefers the interpretation asserted by the applicant. The Clarkson/Bot Collective Agreement may be colloquially referred to as a “pick-up” agreement. That is, the respondent agrees to “pick-up” the terms and conditions for the matters noted in Article 1.5 of the relevant local agreement listed in Schedule “B”. This type of collective agreement is not unusual in the construction industry where some contractors work throughout the province. The requirement in the Clarkson/Bot Collective Agreement in Schedule “B” that the employer “abide by the wage rates and conditions of said agreement” places the “outside” contractor on an equal footing within each local area. In the Board’s view, the meaning of the words just-quoted are clear: the respondent agrees to pay whatever wages and benefits are required of McFarland pursuant to the McFarland Agreement. With respect to the travel allowance and Article 18.1(a), this interpretation would require the respondent to pay its employees the expense allowance referred to therein where, as here, the employees work beyond 65 kilometers but less than a 100 kilometers from the McFarland yard. There is no doubt that, in the McFarland Agreement, the “employer’s yard” referred to is the McFarland yard. The requirement to “pick-up” the McFarland Collective Agreement is not consistent with the respondent’s interpretation, namely, substituting the respondent’s temporary yard on the job site from the McFarland yard. To do so would introduce an element of uncertainty in calculating the travel allowance given that the respondent could designate a “yard” wherever there was a job site within Map Area 2 and, indeed, permit the respondent to arrange matters so as to unilaterally nullify the travel allowance provision entirely. Moreover, such an interpretation would undercut the equalization of the competitive position of the respondent vis a vis the local contractor, a result contrary to the intent of a pick-up collective agreement. The Board does not regard the letter of understanding attached to the McFarland Collective Agreement as applicable to the instant grievance given the facts agreed to and the Board’s analysis of the interpretation of the Clarkson/Bot Collective Agreement, especially Article 1.5 and Schedule “B”, and Article 18.1(a) of the McFarland Agreement.

9. For the reasons given, the Board upholds the grievance and finds that the respondent violated its obligation to pay the travel allowance in Article 18.1(a) of the McFarland Collective Agreement. As requested, the Board remains seized should the parties be unable to agree with respect to the quantification of damages and should any question arise with respect to the interpretation or application of this decision.

3236-90-U Howard Buchin, Complainant v. Toronto Civic Employee’s Union Local 43, Respondent v. The Municipality of Metropolitan Toronto, Intervener

Duty of Fair Representation - Practice and Procedure - Reconsideration - Unfair Labour Practice - Board dismissing complaint because complainant failed to appear at scheduled hearing - Complainant seeking reconsideration on grounds that he mistakenly believed hearing was scheduled for another date - Board’s notice of hearing clearly indicated date of hearing and received at least a month in advance of hearing date - Board finding complainant negligent and holding that non-attendance resulting from negligence not a reason to reconsider decision - Application for reconsideration dismissed

BEFORE: *Nimal V. Dissanayake*, Vice-Chair.

DECISION OF THE BOARD; July 26, 1991

1. This is an application by the complainant for reconsideration of the Board's decision dated April 22, 1991, dismissing his complaint under section 89 of the Act. The Board dismissed the complaint for lack of prosecution because the complainant failed to appear at the hearing scheduled for April 22, 1991.

2. On April 25, 1991, the Board received a letter dated April 23, 1991 from the complainant which reads:

"Please accept my letter of apology for my absence (file #3236-90-U) at the board hearing on April 22/91 at 9:30 a.m., in the board room, 400 University Ave., Toronto, Ontario.

I attended a board hearing on April 16/91, which was the previous Tuesday. Somehow I got confused and believed that my next board hearing was scheduled for April 23/91 (the following Tuesday). I regret the fact that there may have been any inconvenience on your own or the labour boards part."

3. A second letter dated May 7, 1991 from the complainant addressed to the Board reads:

"I am writing to you a note asking to have my board hearing #3236-90-U from April 22nd/91 reconsidered. As I explained in my previous letter to you, I had a board hearing on the previous Tuesday April 16th/91. Mistakenly I believed the missed hearing was to be on the following Tuesday.

I would appreciate your attention in regards to this matter."

4. The Board treated these two letters as an application for reconsideration of its earlier decision under section 106(1) of the Act which reads:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

5. Copies of the two letters were forwarded to the other two parties, both of whom responded in writing. In essence both the employer and the respondent union opposed the application for reconsideration, pointing out that the complainant had proper and clear notice of the date of hearing. The submission from both counsel was that failure to attend a hearing because a complainant made a mistake about the hearing date should not cause the Board to reconsider its decision. The complainant had an opportunity, and did respond, to these submissions, in essence reiterating that the Board should reconsider its decision dismissing his complaint, because his non-appearance was a result of a mistake on his part.

6. The Board has consistently adhered to a stringent policy where a party that had failed to appear at a hearing seeks to have the Board reconsider or re-open its decision rendered in that party's absence. While at first blush this practice of the Board may appear to be somewhat harsh, the Board has explained the need for such a policy from a labour relations point of view. In *M. Sullivan and Son Limited*, [1979] OLRB Rep. January 58, the union had filed a complaint under what is now section 89 of the Act. When no one appeared on behalf of the the complainant at the scheduled hearing, just as the Board did in the present case, it waited for a while, and when no one appeared to prosecute the complaint, dismissed it. In that case the union subsequently filed another complaint raising the same allegations. The respondent employer took the position that the Board ought not to hear the subsequent complaint. The Board treated the subsequent complaint as including an application to reconsider the initial decision dismissing the complaint. In

refusing to reconsider the earlier decision or to permit the complainant union to proceed with the subsequent complaint which was identical to the first complaint, the Board reasoned as follows:

18. When scheduling hearings for all applications before it, including Section 79 [now Section 89] complaints, the Board is mindful of the fact that in labour relations matters speed is generally of the essence and that delay may cause serious prejudice to one or other of the parties. Because of this, the Board's practice upon receiving an application or complaint is to schedule a hearing in the manner for a fixed time and then to inform the parties of the date set. Variations from this date will generally be allowed only on agreement of the parties or if one party cannot attend on that date due to circumstances beyond its control.

19. In a fairly large number of cases the Board has been asked by respondent employers not to proceed with a hearing into a Section 79 [now Section 89] complaint on the date scheduled but rather to adjourn the hearing to some later date. Unless the Respondent could demonstrate that it could not attend on the dates set for reasons beyond its control, the Board has almost invariably refused these requests. If on the date set for hearing the employer failed to appear, or if it appeared it was only to ask without success for an adjournment and then withdrew, the Board has generally proceeded to inquire into the complaint notwithstanding the absence of the employer and, where warranted, issued a decision in favour of the complainant...

21. Doubtless the Board's manner of scheduling hearings and then declining to vary the dates selected except in exceptional circumstances cause some degree of inconvenience to all the parties that appear before it. Nevertheless, this procedure has the effect of keeping delays in the commencement of hearings to a minimum. This, we believe, is of great benefit in the administration of The Labour Relations Act. Not only does it allow the Board to handle all applications in a more orderly and hence in a more expeditious manner, but it also eliminates at least one possible source of delay in Board proceedings. Having regard to the fact that the Board generally deals with situations where delay will cause prejudice, it is our opinion that this matter of proceeding is conducive to the general well-being of sound labour relations in the province.

22. *One result of the Board's system of scheduling hearings is that parties must take care both to ensure that the hearing dates are not missed and also that they have properly prepared themselves for the hearing, which includes ensuring the attendance of essential witnesses.*

23. Where a complainant has had a Section 79 [now Section 89] complaint dismissed due to its non-attendance at a hearing, or a respondent has had a finding made against it notwithstanding its absence from the hearing, we are of the view that having regard to the considerations set out above the absent party bears the onus of showing grounds where the subject matter of that complaint should later be inquired into. This could be done in just about every case by showing that its failure to attend was occasioned [sic] by factors beyond its control. Where this was not the case, however, then a careful weighing of a number of considerations must be undertaken.

24. *One such consideration is the reason for the party's non-attendance at the original hearing. In the instant case we are of the view that the most likely cause of the complainant's non-attendance was inadvertence on the part of its business representative. Inadvertence, however, is not a particularly strong ground for relief. Further, although the inadvertence was not the fault of the grievors, by having the complainant act as their agent in bringing the initial complaint the grievors did put themselves in a position where their rights might be affected by the negligent acts of the complainant...*

• • •

26. *In the interest of sound industrial relations policy and the orderly administration of the Act, we are of the view that parties must take care to ensure they attend the scheduled Board hearings. We are also of the view that where a complaint is dismissed because of a failure of a complainant to attend at the hearing, or a complaint is upheld in the absence of the respondent, as a general principle the Board should not permit the subject matter of the complaint to be reopened unless sufficient grounds for so doing have been advanced by the absent party..."*

[emphasis added]

7. As the Board's first decision notes, a notice of hearing clearly indicating that the hearing had been scheduled for April 22, 1991 was sent by the Board to the complainant's home address on March 15, 1991. In the absence of any suggestion to the contrary and in light of section 113(1) of the Act, it can fairly be deemed that the complainant received this notice at least a month in advance of the scheduled hearing date. The complainant does not claim that he did not receive adequate or accurate notice of the hearing.

8. The sole explanation offered for the complainant's non-appearance is that he mistakenly believed that this hearing was on the Tuesday, April 23rd, because he had had another hearing before the Board on the previous Tuesday. While the complainant claims that he was confused about the hearing date, there is no apparent cause for confusion. The notice sent to the complainant clearly states that the "hearing will take place... *on Monday, the 22nd day of April, 1991 at 9:30 o'clock*". If he had read the notice of hearing he would not only have been clearly informed of the proper hearing date, but also of paragraph 4 of the notice, which states in bold letters: "If you do not attend at the hearing, the Board may proceed in your absence and you will not be entitled to any further notice in the proceedings".

9. At the scheduled hearing on April 22, 1991, the union was represented by legal counsel and a union official. Legal counsel and three members of management appeared on behalf of the employer. Obviously these parties had invested considerable time and expense in preparation for and attending at the hearing. They will be greatly prejudiced if this complainant is allowed to reopen this case. The inevitable conclusion to be drawn is that the complainant simply did not bother to read the notice of hearing he received from the Board. Had he done so, there would have been no confusion about the hearing date. In *M. Sullivan and Son Limited*, (*supra*) the Board held that non-attendance as a result of inadvertence was not a reason to reconsider its decision. In the present case, the complainant has been negligent and his negligence was the sole reason why he missed the hearing on April 22, 1991. Negligence is even a less persuasive reason to reconsider the Board's prior decision, and the Board declines to do so.

10. Accordingly, the application for reconsideration is dismissed.

1041-91-R United Food and Commercial Workers International Union, Applicant v. Canadian Banklock Service Ltd., Respondent

Certification - Practice and Procedure - Employer's head office in Quebec and employees having no fixed workplace - Employer directed to fax to Board list of its service technicians in the bargaining unit together with their addresses - Employer directed to advise Board of business address (if any) in Ontario

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Rundle* and *J. Redshaw*.

DECISION OF THE BOARD; July 5, 1991

1. This is an application for certification in which the union seeks to represent a group of service technicians employed by the respondent employer. The application indicates that the respondent's head office is in the Province of Quebec, and that the nature of the employees' work is such that they have no fixed workplace.

2. The Act and Rules contemplate that when an application for certification is made, notice of that application will be given to the employees potentially affected by it. Ordinarily, that notice can be given by a simple posting in the employees' workplace. Here, however, the employees do not have a fixed workplace, so that notice must be given to them by other means. Accordingly, the Board hereby directs that the respondent employer forthwith fax to the Board a list of its service technicians in the bargaining unit (i.e. working in the Province of Ontario) together with the addresses of those employees. Upon receipt of this information, the application will be processed in the ordinary course.

3. The respondent is further directed to advise the Board of its business address (if any) in Ontario.

2095-90-G; 2260-90-R; 2335-90-G International Association of Bridge, Structural and Ornamental Ironworkers, Local 736, Applicant v. **E. S. Fox Limited**, E. Spencer Construction Ltd., Respondents; International Association of Bridge, Structural and Ornamental Ironworkers, Local 736, Applicant v. **E. S. Fox Limited**, E. Spencer Construction Ltd., Respondents; Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 736, Applicants v. **E. S. Fox Limited**, Respondent

Construction Industry - Construction Industry Grievance - Damages - Related Employer - Remedies - Welland company and Hamilton company alleged to be related employers - Union claiming failure to pay proper commuting allowance - Companies arguing that union estopped by its conduct from relying on section 1(4) of the Act - Board applying principles in *KNK Limited* case - Related employer declaration issuing without retrospective effect - Damages ordered for breach of commuting allowance provision - Liability running from date of grievance to expiry of collective agreement

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *S.B.D. Wahl* and *B. Doherty* for the applicant; *W. J. McNaughton* and *H. Miron* for the respondents.

DECISION OF THE BOARD; July 24, 1991

1. These three applications were listed together for hearing by the Board and came on for hearing January 23, 1991 and continued on June 3, 1991. The applications in Files No. 2095-90-G and 2335-90-G are referrals of grievances in the construction industry for final and binding arbitration under section 124 of the *Labour Relations Act*. The application in File No. 2260-90-R requests a declaration under subsection 1(4) of the Act that the respondents to all three applications be treated as one employer for purposes of the Act.

2. The application in File No. 2095-90-G was made November 8, 1990 and referred a grievance dated October 9, 1990 for arbitration. In the grievance, the International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 ("the union") alleges that E. S. Fox Limited ("Fox") and E. Spencer Construction Limited ("Spencer") carry on associated or related

businesses or activities under common direction or control within the meaning of subsection 1(4) of the Act and, therefore, are bound by the collective agreement between the Ontario Erectors Association, Incorporated and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council effective until April 30, 1992 ("the Agreement"). The grievance alleges further that Fox and Spencer have violated clause 2.9 of Article 2 - Union Security and Appendix "C" of the Agreement by failing or refusing to pay proper commuting allowances. More specifically, it is alleged that the violation has occurred because commuting allowances were calculated from Hamilton City Hall instead of from the Allenburg Post Office, Thorold, Ontario, for work performed on two projects: the Dofasco project in Hamilton and the Hayes Dana project in St. Mary's, Ontario. The Allenburg Post Office is the centre designated by Fox under Appendix "C" of the Agreement for the calculation of commuting and board allowances. The grievance alleges further that Fox has violated clause 2.8 of Article 2 by assigning or re-assigning work to a subsidiary or related company for the purpose of defeating the intent or provisions of the Agreement. The relief sought by the union includes a request for a declaration that Fox and Spencer be treated under subsection 1(4) of the Act as constituting one employer for purposes of the Act and damages for the alleged violations of the Agreement together with interest thereon. Fox and Spencer each filed a reply dated January 22, 1991, to the referral containing the following defence:

At all material times, the union has dealt with E. S. Fox Limited and E. Spencer Construction Limited and [sic] as separate legal entities, each bound by the Ironworkers Provincial Agreement, with full knowledge of their relationship.

It is the position of the respondents that the applicant is estopped from asserting that the companies are not separate entities, each bound by the Ironworkers Provincial Agreement.

3. The union made the application under subsection 1(4) of the Act on November 27, 1990 and, as relief, requested that Fox and Spencer be declared as constituting one employer for purposes of the Act and, therefore, bound to the Agreement. In support of its request that the Board exercise its discretion under subsection 1(4) to declare Fox and Spencer as constituting one employer for purposes of the Act, the application contains the following statements:

- (1) E. S. Fox Limited and the Applicant have been bound by a series of collective agreements between the Ontario Erectors Association Incorporated and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council of Ontario in effect from time to time. E. S. Fox Limited is a member of the Ontario Erectors Association.
- (2) Within the territorial jurisdiction of the Applicant Ironworkers, Local 736, E. S. Fox Limited has selected the Allenburg Post Office as its "centre" of field operations and paid Commuting Allowance in accordance with Appendix "C" to the operative Collective Agreement.
- (3) E. Spencer Construction Ltd. is currently involved in two construction projects as follows:
 - (i) Dofasco Project
 - (ii) Hayes Dana Project
St. Mary's, Ontario

Fox and Spencer each filed a reply to the application. Each reply was dated January 22, 1991, the day before the hearings began. Schedule "A" to Spencer's reply contained the following statement in defence of the application:

Schedule "A"

E. Spencer Construction Limited was incorporated January 22, 1973 as a numbered company. The name was changed to E. Spencer Construction Limited by Supplementary Letters Patent dated June 16, 1975.

E. S. Fox Limited and E. Spencer Construction Limited carry on associated or related business activities under common direction and controls.

E. S. Fox Limited subcontracts Ironworkers labour in the Hamilton area to E. Spencer Construction Limited which employ members of the Ironworkers union, called from the local union hall. E. Spencer Construction Limited is not signatory to any collective agreement. At all times, E. Spencer Construction Limited abided by the then current Ironworkers collective agreement in the Hamilton area. Ironworkers were paid on cheques issued by E. Spencer Construction Limited and all dues, and benefit remissions to the union were made by E. Spencer Construction Limited.

At all times, E. Spencer Construction Limited operated openly, with the knowledge of the union of its relationship with E. S. Fox Limited. Direct supervision was done by members of the union, laid off by E. S. Fox Limited and then hired, through the local union hall as supervisor for E. Spencer Construction Limited. Supervision was paid by E. Spencer Construction Limited and dues and benefits remitted to the local union by E. Spencer Construction Limited.

It is the position of E. Spencer Construction Limited that it is bound by the Ironworkers Provincial Agreement.

In an apparent reference to those statements, Fox's reply submits that the union is not entitled to the relief it is seeking in the application because:

The parties are bound by the Provincial Ironworkers agreement with the Ontario Erectors Association effective until April 30, 1992.

4. The application in File No. 2335-90-G was made December 4, 1990 by the Ironworkers District Council of Ontario ("the District Council") and the union and refers a grievance dated November 26, 1990 for final and binding arbitration. In broad terms, the grievance alleges that, unless Spencer is found to be a subsidiary or related employer to Fox within the meaning of subsection 1(4) of the Act and/or Article 2 of the Agreement, Fox has violated the Agreement by subcontracting to Spencer the performance of work covered by the Agreement at the Dofasco and Hayes Dana projects referred to in the first grievance and, as a result, has failed to pay the proper rates of wages, overtime, vacation pay, holiday pay, commuting allowance and contributions to the various trust funds established pursuant to the terms of the Agreement. The relief sought includes damages for those alleged violations.

5. The application under subsection 1(4) of the Act was made after a hearing into the first grievance referral had been adjourned on consent. The union requested that the two applications be listed together for hearing. The applicants in File No. 2335-90-G made the same request. All three applications were heard together on January 23rd and June 3, 1991. For reasons given orally on the first day of hearing, the Board ruled that it would admit evidence concerning an alleged arrangement between the union and Spencer for the union to refer ironworkers for employment by Spencer and much of the *viva voce* evidence relates to that arrangement. The facts in these applications are largely undisputed and the Board's findings of fact have been made based on the uncontested factual content of the parties' representations on the preliminary evidentiary issue, the admissions in the replies to the grievance referred in File No. 2095-90-G and the application under subsection 1(4) of the Act, and from the evidence of the three witnesses who testified in the proceedings. They were Henry Miron, mechanical manager for Fox and construction manager for Spencer, Brian Doherty, a business representative of the union and Tim Densmore, business man-

ager of the union. All three were credible witnesses, although there was some conflict in the way they described the same events, largely, meetings and discussions between representatives of the union, Fox and Spencer. Where their testimony differed in that respect, the Board's conclusions of fact are based on what was reasonably probable in all of the circumstances. The facts are as follows.

6. Fox and Spencer carry on associated or related activities or businesses under common control or direction within the meaning of subsection 1(4) of the Act. Fox is bound together with the union and the District Council to the Agreement and to a series of predecessor collective agreements. Fox is located in Welland, Ontario, and has designated Allensburg Post Office, Thorold, for the duration of the Agreement, as the centre for purposes of calculating commuting and board allowances pursuant to clause 2.9 and Appendix "C" of the Agreement. Spencer is not signatory to any collective agreement with the union or the District Council or to any collective agreement binding on either of them.

7. Spencer is an Ontario corporation with a registered address of 1 King Street West, Hamilton, Ontario. Since approximately the beginning of 1987, Spencer has had an arrangement with the union to employ ironworkers referred by the union on request from Spencer. They were referred in accordance with the terms of the Agreement. Foremen and general foremen were "name hired" in accordance with the Agreement. Spencer named the persons whom it wished the union to refer as foremen and general foremen. They were always ironworkers employed by Fox. Fox laid them off so that they could go on the union's out-of-work list and be referred from that list to Spencer on Spencer's request. Spencer's name requests for foremen or general foremen were always filled by the union as requested by Spencer. Spencer paid the ironworkers, including foremen and general foremen, the terms and conditions prescribed by the Agreement or its predecessors. Commuting and board allowances were calculated based on Hamilton City Hall, the centre applicable to Hamilton area contractors bound to the Agreement. The ironworkers' wages and related amounts were paid by cheque from Spencer. Similarly, all contributions required under the Agreement for welfare and pension benefits, vacation and holiday pay, union dues and like contributions were made in Spencer's name and remitted on Spencer's cheques.

8. The arrangement between the union and Spencer was first entered into between Miron on behalf of Spencer and Ken Childs, the union's business manager at the time. Under its constitution, the business manager is the union's senior officer responsible for its day-to-day operations. The arrangement continued to be honoured by Stoney Isaacs who succeeded Childs as business manager of the union. Miron did not expressly inform either Childs or Isaacs that Spencer was related to Fox. He simply identified Spencer as a company based in Hamilton which wanted to do business in the Hamilton area employing ironworkers and supplied them with Spencer's address and telephone number. Calls to that number reached a telephone answering service which referred them to Miron at Fox's office in Welland. He did not inform either Childs or Isaacs of that arrangement. Isaacs was succeeded in office by Tim Densmore. The evidence does not reveal when Densmore became business manager, but it is reasonable to infer from all of the evidence that he was business manager when Spencer began to execute the work on the Dofasco and Hayes Dana projects. Spencer only performs iron work and, as its construction manager, Miron is ultimately responsible for the work performed by the ironworkers employed by Spencer. As mechanical manager for Fox, he is responsible for the work performed by ironworkers, boilermakers and millwrights.

9. Spencer has performed ironwork on six projects under the arrangement with the union, including the Dofasco and Hayes Dana projects which are the subject of the grievances. With one exception, the work was performed under subcontracts in the form of purchase orders from Fox.

Fox has its business office in Welland. Since Spencer made the arrangement with the union, it has not performed iron work in the Niagara Peninsula area. Nor has Fox performed iron work in Hamilton and the surrounding area during this same period. If work requiring iron work labour is to be done in the Hamilton area, it is done by Spencer. If such work is to be done in the Niagara Peninsula area, it is done by Fox. The one exception to Spencer performing iron work only under sub-contract from Fox on Fox's construction projects is the Hayes Dana project. That project was performed by Spencer for Warner & Bouw Welding & Fabricating Ltd. under purchase order from Warner & Bouw to Spencer. Fox had no work on the Hayes Dana project and Spencer took the work at the request of Warner & Bouw.

10. All of the work performed by Spencer under its arrangement with the union is work which, if it had been performed by ironworkers employed directly by Fox, would have been covered by the Agreement. Spencer does not bid to Fox for the work which it does for it. The work is priced by Fox's estimators based on the work being performed by Spencer using Hamilton as its base of operations for purposes of calculating commuting and board allowances. Fox carries that price, with or without a mark-up, in its bid to its client. Miron and the estimators are paid by Fox, not Spencer, although Miron believes that a charge is made by Fox to Spencer for their services. The price quoted on the purchase order from Fox to Spencer for iron work to be performed by Spencer for Fox is for Spencer's cost of performing that work.

11. Brian Doherty first became aware of Spencer and the fact that Spencer might be related to Fox in 1988 when Spencer was performing ironwork for Fox at the Toyota plant in Cambridge. Doherty did nothing at the time because the job was the responsibility of another business representative of the union. Nor did he do anything about the Fox/Spencer relationship after he took over responsibility for the project when it was about seventy per cent completed. In August 1990 Doherty learned that Fox was going to be installing some overhead cranes at Dofasco in Hamilton. In expectation that Spencer would be doing the iron work on the project, he called Miron and requested a meeting about it. A meeting was held at Fox's office in Welland involving Doherty, Miron, Miron's boss and one or two other Fox officials. While the Board is satisfied on the evidence that the meeting was held during August, the evidence does not disclose the date of the meeting. Nor does the evidence disclose when Fox and Spencer contracted for the work on the Dofasco and Hayes Dana projects relative to the meeting with Doherty. Doherty told them that the union believed Spencer and Fox to be one and the same company and, if they were, the union would not go along with Spencer being used to do work for Fox using Hamilton City Hall as the centre for calculating commuting allowance under clause 2.9 and Appendix "C" of the Agreement. He told Miron that, in his view, Spencer and Fox could not have two different centres for that purpose. Doherty filed the grievance referred to in the first application when he learned that the commuting allowance for ironworkers employed by Spencer was being calculated based on Hamilton City Hall and not on Allenburg Post Office in Thorold.

12. The parties agree that the Board should determine only whether Spencer and/or Fox are liable for damages for a violation of the Agreement and, if so, remain seized with respect to the amount of damages.

13. On these facts, counsel for the respondents submits that the Board should find that Spencer and the union, by virtue of their conduct under the arrangement for the union to supply Spencer with ironworkers, are bound together to the Agreement and, therefore, there has been no violation of the Agreement by either Spencer or Fox. Counsel argues that Spencer has complied with the full terms of the Agreement whenever it has employed ironworkers and the union has dealt with Spencer as though it were bound to the Agreement and its predecessors. The union also has accepted that the ironworkers referred to Spencer under the Agreement have been correctly

compensated and has accepted from Spencer the remittance of union dues and contributions to the various funds established under the Agreement as though Spencer were bound to the Agreement and its predecessors. Therefore, the union should not be allowed now to claim that Spencer is not bound to the Agreement. In the alternative, counsel submits that, should the Board find Spencer is not bound to the Agreement, the Board should exercise its discretion under subsection 1(4) of the Act to declare that Fox and Spencer are not to be treated as one employer for purposes of the Act because the union has treated them as separate entities and employers for at least three years with the full knowledge that they carry on related activities or businesses under common control or direction. Thus, according to counsel, the union ought not be allowed now to assert that Spencer and Fox should be treated as one employer.

14. For similar reasons, even if Spencer and/or Fox have violated the Agreement, which counsel denies, he contends that the union should be estopped because of its own conduct from claiming damages for Spencer and Fox having proceeded according to Spencer's arrangement with the union. In the alternative, should the Board declare that Fox and Spencer are to be treated as constituting one employer for purposes of the Act and that they have violated the Agreement, the union is estopped from claiming damages because the prerequisites for applying the doctrine of estoppel were established during one of the predecessor collective agreements to the Agreement and, therefore, the estoppel should run until the expiry of the Agreement. Counsel did not refer the Board to any particular award as authority for that proposition, but relied generally on that body of arbitral awards which, he submits, are authority for that proposition.

15. The argument of counsel for the union and the District Council as to the conclusions which the Board should reach on those facts runs as follows. There is no collective agreement between Spencer and the union because there is nothing in writing signed by the parties which could be construed to be a collective agreement within the meaning of the Act. In this respect counsel relies on *Ecodyne Limited*, [1979] OLRB Rep. July 629. With respect to the application for relief under subsection 1(4) of the Act, the Board should exercise its discretion to declare Fox and Spencer to be treated as constituting one employer for purposes of the Act because Fox has used the arrangement between Spencer and the union to avoid having payment of commuting allowance on the Dofasco and Hayes Dana projects calculated from the Allenburg Post Office in Thorold and, because Fox and Spencer are related employers within the meaning of subsection 1(4). Fox's use of that arrangement to avoid payment of the proper commuting allowance under the agreement is a violation of subsection 146(2) of the Act which prohibits employers and unions bound to a provincial agreement from entering into any other agreement or arrangement. Therefore, Fox should not be allowed to rely on an unlawful arrangement to prevent the Board from exercising its discretion under subsection 1(4) to declare that Fox and Spencer be treated as constituting one employer.

16. With respect to the claim that the union had knowledge of the relationship between Fox and Spencer and failed to act on it, counsel asserts that Doherty only became aware of the relationship near the end of the Toyota project and was unaware that Spencer's ironworkers were not being paid commuting allowance calculated from the Allenburg Post Office. The Dofasco and Hayes Dana projects were the first opportunities for Doherty to pursue relief under subsection 1(4) of the Act and, when he learned that commuting and board allowances were being calculated based on the Hamilton City Hall and not on the Allenburg Post Office in Thorold, he filed the union's grievance in File No. 2095-90-G and its request for relief under subsection 1(4) of the Act. Therefore, the union has not slept on its rights, rather has acted to protect them at the earliest opportunity. But, even if the Board finds that the union has not been diligent in acting upon its knowledge, according to counsel, that conclusion should not operate to prevent the Board from issuing a one employer declaration under subsection 1(4). He submits that the union is entitled at

least to relief from the date when it first moved to end the arrangement with Spencer by warning Fox and Spencer that they could not use two centres for the calculation of commuting and board allowances and by asserting its rights under the Agreement as soon as it learned that Spencer was calculating commuting and board allowances based on Hamilton City Hall and not the Allenburg Post Office for the Dofasco and Hayes Dana projects. In this respect, counsel for the union relies on the Board's decision in *KNK Limited*, [1991] OLRB Rep. Feb. 209.

17. With respect to the two grievances, counsel for the union argues that, if the Board declares that Spencer and Fox are to be treated as constituting one employer for purposes of the Act, the payment of commuting and board allowances calculated from the Hamilton City Hall instead of the Allenburg Post Office in Thorold on the Dofasco and Hayes Dana projects is a clear violation of clause 2.9 and Appendix "C" of the Agreement by Fox and Spencer. On the other hand, if the Board does not declare Fox and Spencer as constituting one employer for purposes of the Act, he submits that Spencer has no bargaining relationship with the union and, therefore by subcontracting the ironwork on the Dofasco project to Spencer, Fox has violated clause 2.7 of the Agreement which requires an employer bound to it to subcontract work covered by the Agreement only to employers in contractual relationships with the union. Fox's subcontract to Spencer is also a violation of clause 2.8 because it constitutes an assignment or re-assignment of work to a related employer for the purpose of defeating the intent or provisions of the Agreement. Since the violation of clause 2.8 has resulted from Fox's attempt to avoid payment of proper commuting and board allowances, its actions constitute a violation of clause 2.9 and Appendix "C" of the Agreement, for which the measure of damages would be the difference in the amount actually paid and the amount which should have been paid by calculating the allowances from the Allenburg Post Office in Thorold. Counsel argues also that the Warner & Bouw contract with Spencer is a violation of clause 2.8 because it constitutes an assignment or re-assignment of work from Fox to Spencer. Counsel argues further that the measure of damages for the violation of clause 2.7 would be damages calculated in accordance with the principles set out in *Re Blouin Drywall Contractors Ltd.* (1973) 4 L.A.C (2d) 254 (O'Shea), reviewed 48 D.L.R. (3d) 191, reviewed 75 C.L.L.C. 14,295 (C.A.), leave to appeal to S.C.C. refused November 17, 1975.

18. The relevant sections of the *Labour Relations Act* are subsections 1(1), 1(4) and 146(2), each of which reads as follows:

1.-(1) In this Act,

...

- (e) "collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement;

...

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

146.-(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

19. The relevant clauses of the Agreement are as follows:

ARTICLE 2 - UNION SECURITY

• • •

2.7 An Employer agrees not to subcontract or sublet any work covered by this Agreement to any person, firm or corporation which is not in contractual relationship with the International Association of Bridge, Structural and Ornamental Ironworkers or Local union thereof.

2.8 An Employer also agrees not to assign or reassign work to any subsidiary, related company, or trade for the purpose of defeating the intent or provisions of this Collective Agreement.

2.9 An Employer will make payment to employees of any applicable commuting, travel, board, transportation or room and board allowances as set out in Appendix "C".

• • •

APPENDIX "C"

Commuting, Travel and Board Allowance is not payable, regardless of the distance to the job site when the employee leaves his home base and returns the same day in a Company vehicle and is being paid his applicable wage rate.

All distances in this Appendix will be measured by the most direct route accessible by passenger automobile.

1. COMMUTING ALLOWANCE

(a) Commuting allowances will be paid from the appropriate centres:

• • •

Local 736 Hamilton City Hall, Waterloo-Wellington Airport Tower in Kitchener Area, Allensburg Post Office.

NOTE: An employer based in either Kitchener or the Niagara Peninsula may select as his appropriate centre any of these three but this selection will not be changed during the term of the Agreement.

• • •

20. These applications raise the following issues for decision by the Board:

(1) Is Spencer bound to the Agreement because of the way it and the

union dealt with the employment of ironworkers by Spencer under the arrangement between them?

- (2) If not, should the Board declare Fox and Spencer to be treated as constituting one employer for purposes of the *Labour Relations Act*?
- (3) If the Board declares that Fox and Spencer are to be treated as constituting one employer for purposes of the Act, have Fox and Spencer as a single employer breached the Agreement?
- (4) If the Board does not declare that Fox and Spencer are to be treated as constituting one employer for purposes of the Act, has Fox breached one or more of clauses 2.7, 2.8 or 2.9 of the Agreement?
- (5) If the Board finds that Fox and Spencer as one employer, or Fox alone, has breached the Agreement, is the union estopped from claiming damages?

21. The claim that Spencer is bound to the Agreement is raised as a defence against the union's request for a subsection 1(4) declaration and to the allegation that Fox has breached the Agreement. Insofar as that issue affects the exercise of the Board's discretion under subsection 1(4), the Board must determine whether Spencer is bound by the Agreement in accordance with the Act. Subsection 1(1)(e) requires a collective agreement to be in writing and signed by both parties. The union and Spencer have not signed any document or documents which would bind them to the Agreement. The fact that they have applied the terms and conditions of the Agreement to the ironworkers employed by Spencer does not confer bargaining rights on the union. In this respect, see the Board's decision in *Ecodyne Limited*, *supra*, and the cases referred to therein at paragraph 28. Therefore, the Board finds that Spencer is not bound to the Agreement and the union has no bargaining rights for ironworkers employed by Spencer.

22. If the union does not have bargaining rights for ironworkers employed by Spencer pursuant to the Agreement, should the union be able to acquire those rights by means of a Board declaration pursuant to subsection 1(4) of the Act that Spencer and Fox be treated as constituting one employer for purposes of the Act? Fox and Spencer say not because the union has treated them as separate employers since the start of the arrangement between Spencer and the union and Fox and Spencer have conducted themselves accordingly respecting the performance of ironwork. More particularly, Fox and Spencer have relied on the union's acceptance of its arrangement with Spencer to bid the Dofasco and Hayes Dana jobs based on commuting and board allowances calculated from the Hamilton City Hall. Therefore, it would be a serious financial detriment to Fox and Spencer were the Board to permit the union now to withdraw from the arrangement and plead for relief pursuant to subsection 1(4) of the Act.

23. The Board understands counsel for Fox and Spencer to be saying that the union is estopped by its conduct from relying on subsection 1(4) for relief, not that the Board is estopped from applying subsection 1(4). Even if the Board has misunderstood that aspect of their counsel's argument and assuming the existence of the prerequisites for applying the doctrine of estoppel, the Board would not be estopped from making a one employer declaration. This is because "... the doctrine of estoppel cannot be evoked to prevent the operation of a public statute such as the *Labour Relations Act*...". See *J.D.S. Investments*, *supra*, at paragraph 10 and the authorities referred to therein. That is not to say, however, that the Board cannot rely on the doctrine of estoppel or on conditions akin to estoppel in the exercise of its discretion to make or not make a one employer declaration under subsection 1(4) of the Act. Where the prerequisites which give the

Board that discretion have been satisfied, the question is always whether the Board ought to make the declaration. The existence of estoppel-like conditions is only one of the circumstances which the Board might weigh in deciding the exercise of its discretion. That exercise always involves a balancing of the labour relations purpose of subsection 1(4) to preserve bargaining rights with the potential prejudice to a respondent in making the declaration and to an applicant in not making it.

24. On the basis of the respondents' admission that Fox and Spencer are related employers under common control or direction and on all of the evidence before the Board, the Board finds that Fox and Spencer are related employers within the meaning of subsection 1(4) of the Act and the only question is how the Board should exercise its discretion. This case is different in one respect from many of the applications under subsection 1(4) which come before the Board in that Fox has not used Spencer as a means of ignoring the Agreement. Spencer has applied all of the conditions of the Agreement as though it was bound by it. Nonetheless, Fox's use of Spencer and Spencer's arrangement with the union, has enabled Fox to calculate the cost of commuting and board allowances, for the purpose of bidding and executing projects, from the most advantageous of Hamilton City Hall or the Allenburg Post Office, instead of from the Allenburg Post Office in every case. Clearly, Fox's use of Spencer has enabled Fox to circumvent the Agreement and, in that respect, to erode the union's bargaining rights under the Agreement. Should the Board declare that Fox and Spencer are to be treated as constituting one employer for purposes of the Act, there is no doubt that, together, they have breached clause 2.9 and Schedule "C" of the Agreement by calculating commuting and board allowances from Hamilton City Hall instead of from the Allenburg Post Office in Thorold.

25. While Miron did not explicitly inform the union of the relationship of Spencer to Fox, the union did not seriously contend that it was not aware of the relationship from the outset of the arrangement. Having regard to Miron's responsibility for the work of the union's ironworkers employed by both Fox and Spencer and the fact that Spencer's foremen and general foremen were always ironworkers laid off by Fox so that they could be referred by the union to Spencer, the Board is satisfied that the union knew of the relationship between Fox and Spencer when it referred ironworkers to Spencer and received remittances from it for union dues and employer contributions to various funds under the Agreement. Therefore, the question for the Board is whether the union's delay in seeking remedy under subsection 1(4) of the Act should cause the Board not to declare that Fox and Spencer be treated as constituting one employer for purposes of the Act, as counsel for the respondents contends or simply affects the effective date of the Board's declaration, as union counsel contends.

26. The Board in *KNK Limited, supra*, considered those choices in a substantially different fact situation. After reviewing at length the development of the Board's application of subsection 1(4) over the years, the Board expressed the view at paragraph 57 that:

... where a trade union has established the legal requirements for a section 1(4) declaration, as well as the 'mischief' which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. ...

The Board in that case went on to observe that, where the union's inaction was tantamount to abandonment of its bargaining rights, the Board might dismiss the application, but, "... where the balance of labour relations interests can be achieved by limiting the retrospective effect of a declaration ..., the Board should consider that option rather than dismissing the application altogether."

27. Although the erosion of bargaining rights in *KNK Limited* was substantially greater than in the instant case, and the union here actively contributed to the mischief from which it now seeks relief, the Board agrees with and adopts both propositions expressed in the above quotations from that decision. First, that "... [a one employer] declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so.". Second, that, while the Board might dismiss an application where "... a union's inaction was tantamount to abandonment of its bargaining rights," the Board should consider the option of limiting the retrospective effect of a declaration rather than dismissing the application altogether "... where the balance of labour relations interests can be achieved ..." by so doing. Therefore, the Board will examine whether the declaration ought not be made because of "particular prejudice" or "compelling policy reasons"; or whether the application ought to be dismissed because the union's inaction was tantamount to an abandonment of its bargaining rights; and, if neither result is appropriate, whether making a declaration but limiting its retrospective effect would balance the labour relations interests at play in the application.

28. There is no doubt here that, by making the arrangement with Spencer and letting it operate for some three years, the union has contributed to the creation of the "mischief" from which it now seeks relief via a one employer declaration from the Board. The arrangement allowed Fox to enjoy the flexibility of having two centres within the union's geographic jurisdiction from which to calculate commuting and board allowances, a flexibility which was not available to it as a single employer bound to the Agreement. When Doherty met with Miron and other Fox officials and warned them that the union would not accept Fox and Spencer using two different centres if they were in fact one and the same employer, it was a clear warning to Fox and Spencer that the union intended to prevent them from continuing to operate in that manner. Fox and Spencer chose to ignore the warning and when the union learned that commuting and board allowances for the Dofasco and Hayes Dana projects were not being calculated from the Allenburg Post Office, it began these proceedings by serving Fox and Spencer with the grievance dated October 9, 1990, including the claim that they were related employers within the meaning of subsection 1(4) of the Act.

29. What, then, is the potential prejudice to Fox and Spencer should the Board declare that they be treated as constituting one employer for purposes of the Act, and what is the potential prejudice to the union if the Board does not make the declaration? As the Board has noted earlier, this application is unlike many others made under subsection 1(4) of the Act in that the related non-union employer has not been used by the employer with the collective bargaining obligations to totally circumvent those obligations. That situation is reflected in the potential prejudice to the parties of the Board making or not making a one employer declaration.

30. For Fox, the potential prejudice includes the risk of being liable for damages for breach of clause 2.9 of the Agreement should the union succeed in its claim for damages under the first grievance. That risk would remain, however, even were the Board to not make a one employer declaration. That is because Fox would still have to defend itself against the union's allegations that, when Spencer performed ironwork for Fox on the Dofasco and Hayes Dana projects, Fox violated clauses 2.7 and 2.8 of the Agreement and that the measure of damages for which Fox would be liable would include underpayment of commuting and board allowances because they were calculated from Hamilton City Hall instead of the Allenburg Post Office. The union is not claiming any damages for projects performed under the arrangement with Spencer prior to the Dofasco and Hayes Dana projects, so there is no potential prejudice to Fox respecting earlier projects. Prospectively there is potential prejudice to Fox in the loss of the flexibility of choosing to subcontract to Spencer when it would be to Fox's advantage to have commuting and board allowances on its projects calculated from Hamilton City Hall instead of the Allenburg Post Office. The

reality is, however, that the union would not likely continue to refer ironworkers for employment by Spencer if the one employer declaration is not made.

31. The potential prejudice for Spencer flowing from a one employer declaration would be the loss of its separate identity as an employer of ironworkers. But that would be the direct consequence of Fox's use of Spencer to give Fox a second centre from which to calculate commuting and board allowances. In any event, every non-union employer captured by a subsection 1(4) declaration finds its identity submerged in that of the related employer with the collective bargaining obligations. Not a surprising result considering that the purpose and effect of a subsection 1(4) declaration is to eliminate the labour relations significance of a related non-union employer. The union would become bargaining agent for ironworkers employed by Spencer and Spencer would be treated for all purposes under the Agreement as though it was Fox. Spencer also would be at risk, together with Fox, of being liable for damages for breach of clause 2.9 of the Agreement should the union's claim succeed. Absent the one employer declaration, Spencer would not be bound to the Agreement and, unlike Fox, would not be at risk of being liable for damages for breaching the Agreement.

32. Should the Board not make a one employer declaration, the potential prejudice for the union lies in the continuing presence of Spencer as a separate employer of ironworkers not bound to the Agreement. While, by the simple expedient of not referring ironworkers for employment by Spencer, the union can readily prevent Fox from using Spencer as it has, Spencer's continued existence as an employer related to Fox within the meaning of subsection 1(4) and not bound to the Agreement would subject the union to the risk that Fox again might use Spencer to avoid obligations under the Agreement.

33. It seems then that the only potential prejudice to Fox and Spencer flowing from a one employer declaration which might be attributed to the union's inaction is the prejudice of having to apply a term of the Agreement which, together, they have circumvented for the past three years and the consequent risk of damages. The risk of damages for breach of clause 2.9 of the Agreement could have been avoided or mitigated if Fox and Spencer had heeded Doherty's warning. The prejudice to the union, on the other hand, if the Board does not declare Fox and Spencer to be treated as constituting one employer, would be the risk that Fox might use Spencer again to avoid any of its obligations under the Agreement. That is the type of mischief which subsection 1(4) of the Act was designed to prevent. Where, as here, actual mischief already has been demonstrated, the potential prejudice to the union outweighs the potential prejudice to Fox and Spencer of having to comply with the Agreement, and so end the mischief, and of being at risk of damages because of the mischief which they created. There is no compelling policy reason for not making a one employer declaration. Nor can it be said that the union's inaction respecting the breach of the Agreement amounts to abandonment of its bargaining rights such that the Board ought to dismiss the application.

34. Therefore, in the Board's view, these are not circumstances in which the Board ought to either withhold its declaration or dismiss the application. On the other hand, since the union's own conduct in entering into its arrangement with Spencer contributed to Fox's opportunity to avoid its obligation under clause 2.9 of the Agreement, the Board is also of the view that its declaration ought not to have retrospective effect from the start of the relationship between Fox and Spencer as it normally would. See *J.D.S. Investments Ltd.*, [1981] OLRB Rep. March 294. When the union filed its grievance against Fox and Spencer on October 9, 1990, relying on the assertion that Fox and Spencer were related employers pursuant to subsection 1(4) of the Act, they were put on notice that they might be liable for damages under the Agreement if the union made out its case before the Board, unless they acted to mitigate their damages. Therefore, it seems to the Board

that, to give the union relief in the form of a subsection 1(4) declaration effective from the date when Fox and Spencer were served with the union's grievance would be an appropriate balancing of the labour relations interests in the circumstances of this case.

35. Therefore, the Board declares that E. S. Fox Limited and E. Spencer Construction Ltd. are to be treated as constituting one employer for purposes of the *Labour Relations Act* effective from October 9, 1990.

36. With respect to the issue of whether Fox and Spencer are liable for damages, the evidence supports the conclusion that work was performed on both the Dofasco and Hayes Dana projects after October 9, 1990. It is admitted by Spencer that Hamilton City Hall was used as the base for determining whether commuting and board allowances were to be paid on the two projects, and not the Allenburg Post Office. To that extent, as the Board noted earlier, there has been a clear breach by Fox and Spencer of clause 2.9 and Schedule "C" of the Agreement as alleged in the October 9, 1991 grievance. The remaining question is whether the union is estopped from claiming any damages arising out of the breach, as contended by counsel for Fox and Spencer.

37. The Board accepts that there are two bodies of arbitral jurisprudence respecting when estoppel ends, as argued by counsel. However, assuming without finding that the facts establish the prerequisites for estoppel, and without attempting to analyze the jurisprudence any more than the parties did in arguing for either proposition, the Board is satisfied on the facts here that the estoppel must end coincident with its declaration that Fox and Spencer are to be treated as constituting one employer for purposes of the Act. This is because the continuation of an arrangement between the union and Spencer, now that both Spencer and Fox are bound to the Agreement, which would allow Fox to use the Hamilton City Hall and the Allenburg Post Office for the calculation of commuting and board allowances, instead of the Allenburg Post Office, would be an "... arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement ..." within the meaning of subsection 146(2) of the Act. The union is an affiliated bargaining agent bound by the Agreement and Fox and Spencer together are an employer bound by the Agreement. Subsection 146(2) prohibits them from entering into such an arrangement.

38. Therefore, E. S. Fox Limited and E. Spencer Construction Ltd. are liable for any damages suffered by the International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 and its members as a result of the employer's violation of clause 2.9 and Schedule "C" of the collective agreement between the Ontario Erectors Association, Incorporated and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council effective until April 30, 1992. The liability for damages will run from October 9, 1990. However, if Fox and Spencer contracted for work on the Dofasco and Hayes Dana projects prior to Doherty's warning in August 1990 that the union would not accept them using two centres for the calculation of commuting and board allowances, they reasonably might have done so in reliance on Spencer's arrangement with the union. In that event, therefore, no liability for damages would attach to iron work performed on those projects which was contracted for prior to the August meeting with Doherty. In accordance with the agreement of the parties, the Board remains seized respecting the amount of damages owing to the union and its members should the parties be unable to agree on it.

39. In the result, the allegation in Board File No. 2095-90-G that Fox breached clause 2.8 of the Agreement and in Board File No. 2335-90-G that it breached clauses 2.7, 2.8 and 2.9 are redundant. Therefore, the application in File No. 2335-90-G is dismissed and the application in File No. 2095-90-G is dismissed insofar as it alleges a breach of clause 2.8 of the Agreement.

40. In summary, in the application in Board File No. 2260-90-R, the Board has declared that E. S. Fox Limited and E. Spencer Construction Ltd. are to be treated as constituting one employer for purposes of the *Labour Relations Act* pursuant to subsection 1(4) of the Act effective October 9, 1990; has found that they have breached clause 2.9 and Schedule "C" of the collective agreement between the Ontario Erectors Association, Incorporated and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council effective until April 30, 1992 as alleged in File No. 2095-90-G; has dismissed the application in File No. 2335-90-G; and, has dismissed the application in File No. 2095-90-G insofar as it alleges that E. S. Fox Limited has breached clause 2.8 of the collective agreement. The Board remains seized respecting the amount of damages owing, if any, for the breach of clause 2.9 and Schedule "C" of the collective agreement.

0938-91-G International Brotherhood of Electrical Workers, Local Union 1788, Applicant v. Electrical Power Systems Construction Association and Ontario Hydro, Respondents

Collective Agreement - Construction Industry - Construction Industry Grievance - Severe storm leading employer to cancel afternoon shift - Employees reporting for work not receiving reporting pay - Whether in breach of collective agreement - Collective agreement creating exception to reporting pay obligation where employer considers it necessary to shutdown job to avoid possible loss of life - Employer vested with subjective ability to determine whether shutdown necessary - Language of collective agreement not creating requirement of reasonableness by which to judge employer's decision - Grievance dismissed

BEFORE: Paula Knopf, Vice-Chair, and Board Members J. A. Ronson and H. Peacock.

APPEARANCES: Brian J. Scott, Harold Bartlett and Robert Thoms for the applicant; Guy W. Giorno, Vello W. Medri, Barry Roberts and Lavern Shillington for the respondents.

DECISION OF THE BOARD; July 24, 1991

1. It was a dark and stormy day. Since morning, gale force winds had buffeted the Lakeview Thermal Generation Station in Port Credit. Brutal winds picked up quantities of lumber, two-by-fours and debris. These flew through the air together with sheet metal that was torn from parts of the Station. This was the situation on March 28, 1991 facing the employees and management involved in this case.

2. This grievance arises because management determined that the weather situation on this day created an emergency and hazard to the safety of employees. As a result of this, management closed down the afternoon shift for the entire facility and prevented those employees who reported in for work from commencing their duties. Those who did report in were not given any reporting pay and the union alleges that this constitutes a violation of the following provisions of

the collective agreement.

- | | |
|-------------------------|--|
| 803
Reporting
Day | <p>A. An employee who reports for work, unless directed not to report the previous day by his Employer, shall receive a minimum of three (3) hours' pay plus his appropriate daily travel or board allowance at the applicable rate when he reports for work but is unable to commence or continue to work because of circumstances beyond his control. An employee will not receive this allowance if he is unable to complete his shift as a result of inclement weather.</p> <p>B. Notwithstanding Subsection 803, Item A above, when an Employer considers it necessary to shut down a job to avoid the possible loss of human life, because of an emergency situation that could endanger the life and safety of an employee, in such cases, employees will be compensated only for the actual time worked.</p> |
|-------------------------|--|

3. There is no real dispute over the relevant facts. The weather situation on this particular day was quite extreme. The average wind speed for the day was 61 kilometers, gusting up to 93 kilometers per hour with the wind chill equivalent temperature near minus eight degrees Celsius. The morning shift began as usual with close to 1,000 employees being able to report to duty and commence their responsibilities. However, by approximately 9:30 a.m., it became clear to management that the debris and lumber being swept around the southern part of the facility presented a danger to anyone who would be in that area. Immediately steps were taken to cordon off the entire south section of the grounds outside of the plant itself. The parties both refer to this area as the "danger zone" on the day in question. Within the danger zone was one construction trailer where members of this bargaining unit assembled every morning upon reporting in and would meet for their breaks, lunches and at the conclusion of the day. Slightly to the west of this were another two trailers also used by members of this bargaining unit for the same purposes. When the southern part of the facility was cordoned off after 9:30 a.m. all the employees using the one trailer to the south of the building were told to reassemble at a different point within the facility proper. It appears that the other two trailers were used into the afternoon. However, employees' access to and from them was restricted by the safety measures implemented by management.

4. Other than the extraordinary safety precautions taken to seal off the southern portion of the facility, the morning shift seems to have operated without any other incident or difficulty. However, by approximately 1:30 p.m., management had received a report from Environment Canada advising that the gale force winds would continue for the rest of the afternoon. Further, management became aware that sheet metal was being torn from parts of the building and presenting another hazard in the danger zone. Sometime between 1:30 and 2:00 p.m., management made a determination that it could not ensure the safety of afternoon shift employees. This shift included members of other bargaining units. Management listed several reasons for making this determination. First, it was felt that a significant number of crews and employees on the afternoon shift would have to make their way to construction trailers within the danger zone for purposes of assembly. Because of the flying debris, this was considered to be unsafe. Secondly, in the afternoon shift, there would be fewer security and supervisory staff available to enforce the barricades created for the employees' safety. While it is true that there was also a proportionately less staff in the afternoon shift, there would have only been one firefighter, one safety officer and a few security guards. Management felt that they could not properly maintain or monitor the safety zone. Third, there was concern for some of the trades which would have been scheduled to work in the actual danger zone. Fourth, there was concern that the on-set of darkness in the later afternoon would increase hazards of employees who would have to move from the construction trailers into the facility. Fifth, there was some concern over the fact that employees in the afternoon shift had a habit of arriving anywhere between 2:00 and 3:30 for a shift which began at 3:30. There was concern that there would be no adequate or appropriate facility for these people to await the beginning of their shift because they could not move into their regular assembly points which were in the

danger zone and management could not arrange or determine any alternative for them. Finally, management was wary because despite all the precautions taken during the day shift to keep people out of the danger zone, three people had actually gotten through the corridors and exposed themselves to considerable danger.

5. Because of all these considerations, management decided to instruct the guards attending the parking lot to turn all employees reporting in for the afternoon shift back to their homes. Their names were gathered for purposes of paying daily travel and board allowance under Article 8.03(a). However, no reporting pay was paid.

6. In the meantime, all of the employees leaving at the end of the day shift exited the facility through the northern exits without incident. Between eight and twelve members of this bargaining unit were kept on from the morning shift for some overtime work in the same area that the afternoon shift bargaining members would have done electrical work. The parties agree that those eight to twelve employees from the morning shift did work which was separate and discreet from work that the afternoon shift would have done. The afternoon shift work was actually done at a later date at overtime rates by members of this bargaining unit.

7. The evidence presented by management was given through Mr. Lavern Shillington. He was the Assistant Divisional Superintendent at the facility on this particular day and was in charge of the facility. It was his determination that there was an emergency and he testified that he sent the afternoon shift home on the basis of health and safety concerns. The essence of Mr. Shillington's evidence was that the employees reporting for the afternoon shift could not practically be given assembly points and kept out of the danger zone as they reported in anywhere from 2:00 to 3:00 in the afternoon. Thus, it was considered essential to safety to simply keep the entire shift from reporting.

8. The essence of the union's evidence was that while there may have been severe weather on that day, steps could have been taken to reassign assembly points for the various crews and to both instruct them on the dangers of entering the danger zone and ensure that no such entries were made. For example, the union's evidence established that construction trailers existed on the west side of the facility and that this bargaining unit had its own lunchroom within the plant itself which could have acted as an assembly point.

The Argument

9. Both parties acknowledged that the onus was upon the union to establish the ingredients of its case in order to succeed in this grievance. However, given the unusual nature of the case, it was agreed that management would present its arguments first.

10. Counsel for the employer stressed the language and importance of Article 8.03(b) to a determination of this case. First it was argued that the Article only imposes a subjective test upon the employer to make a determination of an emergency that could endanger the life or safety of an employee. It was argued that provided management's consideration is not arbitrary, discriminatory or made in bad faith, the discretion is given to the employer to make that determination and it is not reviewable by this Board. It was stressed that the collective agreement has given management the right to make such a determination and the Board was asked to "give affect to the parties' agreement". In the alternative, it was argued that if a standard of reasonableness should be applied to management's decision, we were asked to conclude that the circumstances were such and the time considerations upon the employer were such that the decision must be considered reasonable and made simply because of safety concerns for employees. Indeed, it was said that management's decision was necessary to comply with the *Occupational Health and Safety Act*. Finally, it was

argued that this arbitration ought not to involve luxury “second guessing” of management’s decision or to enable a board of arbitration with the benefit of hindsight in the luxury of time to substitute a decision which management had to make on the spot. Instead, the Board was asked to put itself back into the time frame when management made the decision and determine whether or not that decision applied to the collective agreement.

11. Counsel for the union argued that the facts do not establish that an emergency existed or that there was “shutdown” on that day. It was conceded that the winds presented a safety concern and that Hydro “took proper steps to close off the south side of the building.” However, it was argued that these winds should be considered only a “nuisance or inconvenience” as opposed to an emergency. The Board was asked how we could conclude that an emergency existed given the fact that the shift operated earlier that day and the people were able to exit without incident. It was argued that had the afternoon shift been allowed to report into work through the north part of the building and had been kept out of the danger zone, they could have worked without any risk to themselves and thus Article 8.03 be ought not to apply. Further, it was argued that the facts do not establish that a true shutdown occurred in that the entire plant was not closed because evidence showed that some employees did work overtime in the afternoon shift. Reliance was placed on the case of *Colonial Cookies a Division of Beatrice Foods Inc.*, (1990) 13 L.A.C. 4th, 405 (Foisey). Finally, while it was conceded that Article 8.03 does grant an employer a discretion in the determination of an emergency, it was stressed that that discretion ought to be exercised reasonably. However, it was argued that management’s decision in this case was not reasonable as various alternatives could have been used rather than sending the shift home and denying them reporting pay or the opportunity to work.

The Decision

12. This case turns on the meaning and application of the collective agreement. Article 8.03 deals with reporting pay. Under Article 8.03(a) the parties have agreed that employees who report to work without receiving directions otherwise from the employer on the previous day are guaranteed the minimum of three hours pay plus the appropriate daily travel or Board allowances. However, under Article 8.03(b), the parties created an exception to this wherein they acknowledged situations where it may become necessary to “shutdown a job to avoid possible loss of human life” and to protect the life and safety of the employees. In this situation, the parties to the collective agreement have agreed that where the union members may report to work and then be sent home without a full shift they will still get their travel and board allowances, but they will only be compensated for the actual time they worked. The question this arbitration poses is what standard of arbitral review is there upon the employer when it makes a determination to shut down a job.

13. After considering the evidence and arguments of the parties, it is our conclusion that the language of Article 8.03(b) is both clear and unusual. That Article gives to the employer the discretion to determine when it is necessary to shutdown the job because of an emergency. The language vests in the employer the subjective ability to make that determination. Had the language read “when it is necessary to shutdown a job to avoid the possible loss of human life etc.”, it would be possible to accept the union’s argument that an objective test must be applied to the circumstances. However, the language of Article 8.03 allows the employer to make the subjective determination or “consideration” of when it becomes necessary to shutdown a job. The exercise of that subjective discretion is not completely unlimited. Both parties agree that that discretion must be exercised in a way that is not arbitrary, discriminatory or in bad faith. There is no allegation of discriminatory or bad faith motivation or actions on behalf of management in this case. Nor does the evidence establish that the employer’s decision was arbitrary. The employer considered a great many factors. With the benefit of hindsight and the luxury of time, it may be possible to see differ-

ent ways which the employer could handle the situation, but it cannot be said on the basis of the evidence before us that the employer's decision was so reckless or headless of reasonable consideration that the decision can be considered arbitrary.

14. Further, we cannot accept the union's argument that the language of this collective agreement creates a requirement of reasonableness by which to judge the employer's decision. Again, the language of Article 8.03 gives the employer the discretion to shutdown a job to protect the life and safety of employees. Nothing in the language of the collective agreement imposes a standard of reasonableness upon the employer. However, we feel it only fair to note by way of *obiter dicta* that the employer's actions were reasonable under these circumstances. The union was persuasive in establishing that there were other alternatives available to management which they it not consider fully at the time. However, the worst that can be said is that management erred on the side of caution by shutting down the shift in order to protect employees health and safety. Under the circumstances, we cannot say that management acted unreasonably. On the contrary, their decision was reasonable and prudent on all the circumstances.

15. On the basis of all these factors, we have determined that the grievance must be dismissed.

2681-90-U Brewery, Malt & Soft Drink Workers, Local 304, Complainant v. Fabricland Distributors Inc., Respondent

Discharge - Discharge for Union Activity - Unfair Labour Practice - Probationary employee discharged shortly after engaging fellow employees in discussion about possibility of organization of union - Board not persuaded that no part of discharge was in response to news of potential union drive -Complaint upheld - Reinstatement with compensation and posting ordered

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members W. A. Correll and H. Peacock.

APPEARANCES: J. C. Nelson and S. Batchelor for the complainant; J. A. Millard and Barbara Pultz for the respondent.

DECISION OF K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK; July 24, 1991

1. This is a complaint under section 89 of the *Labour Relations Act* ("the Act") alleging breaches of sections 64, 66(a), 66(c), and 70 of the Act.

2. The respondent retails fabric and other materials for sewing. The complainant alleges that she was fired as a result of her efforts to engage employees at its Burlington store in discussion about the possibility of organization of a union. The company replies that this had nothing to do with her discharge, which was based solely on her failure to perform adequately as an Assistant Manager trainee. We will summarize the facts briefly below.

3. Eva Pikna is the Manager at the Burlington Store. As such she has power to hire and fire employees although she has a supervisor available for consultation. She testified that before firing she would need to consult with her supervisor more so than for hiring. She is responsible for

staffing levels at the store according to a ratio between sales and staff. When reducing hours to deal with falling sales in the past, she has first asked if anyone wanted fewer hours and then reduced hours according to seniority while providing the necessary skills, if there were insufficient volunteers.

4. On September 8, 1990, Ms. Pikna advertised for new employees. Ms. Batchelor, the complainant, had earlier applied for work at the store and was accordingly interviewed on September 10, 1990. Shortly thereafter, five new employees were hired with a period of three months' probation. Ms. Batchelor started on September 17, 1990 along with three others. One employee started a week later. No employees were guaranteed hours, but each was asked if she would be willing to work part-time or full-time and then scheduled hours according to the store's requirements.

5. At the interview, Ms. Batchelor, as well as each of the other applicants, was asked if she were interested in training as a management trainee. This was because the Assistant Manager, Liz Ferraz, was due to start maternity leave in January, 1991 and needed to be replaced for six months. Ms. Batchelor said she would be interested. However, she says that she was hired and started work thinking she had been hired as a sales clerk. She says she had no information as to whether or not she had been picked as a management trainee and was only informed of this by accident by another employee after she started work. Ms. Pikna maintains that at the beginning of Ms. Batchelor's training she told her that she was training her to be a management trainee. Ms. Batchelor testified that Ms. Pikna would ask her from time to time if she wanted to be a management trainee and acknowledges she knew she was the trainee by the end of October.

6. Ms. Batchelor was hired at \$5.60 an hour. Ms. Ferraz was making \$280.00 a week as Assistant Manager.

7. In the interview, Ms. Batchelor had informed Ms. Pikna that she had commitments to a theatre group which would be ending in the month of October and that therefore there would be two nights a week in which it would be difficult for her to work. She also mentioned her outside commitments in her application. Ms. Pikna tried to work around this and postponed the management training until the end of October. She agreed she had hired Ms. Batchelor with knowledge of her other commitments. Ms. Batchelor's uncontradicted testimony is that she had also told Ms. Pikna at the interview that she was not interested in a career with Fabricland.

8. Ms. Pikna said that she explained to Ms. Batchelor that she would be working one evening a week, Saturdays as required, and through the week as scheduled. When counsel put to Ms. Pikna that she had told Ms. Batchelor "occasional Saturdays but not all" she agreed. In the end Ms. Pikna said she did not remember whether she had said the odd Saturday as Ms. Batchelor recalls, or most.

9. Around the end of October, Ms. Pikna changed Ms. Batchelor's schedule. Ms. Batchelor did not see the change until Friday, the day before she was supposed to have reported for work on the changed schedule. She left Ms. Pikna a note saying that she needed forty-eight hours notice of such changes in schedule in that she made commitments based on the schedule when it was posted. Ms. Pikna says that the change had been made on the Tuesday before and that Ms. Batchelor was under an obligation to check it daily for any changes in the schedule. Ms. Batchelor states that she and another employee had looked for the schedule and could not find it until the Friday. This incident resulted in no comment from Ms. Pikna to Ms. Batchelor until the discharge interview when Ms. Pikna said it was a factor in her discharge.

10. Ms. Ferraz described her duties as Assistant Manager to include doing the cash proce-

dures at the end of each shift and a read on the cash register so it can be closed off and balanced and the cash brought to the bank. She was responsible for weekly balances and totals on Saturday if the Manager was off. She was also responsible to make sure that work was being done during the day, for receiving and for help with sales at the cutting table if needed. She replaced the manager on her day off, which involves generally making sure things are running smoothly.

11. Toward the end of October, Ms. Pikna started Ms. Batchelor's management training aimed at having her capable of replacing Ms. Ferraz in January. Ms. Pikna said she gradually transferred her from the sales clerk stream to the management stream and that there was no dramatic change for Ms. Batchelor at that point. She started her on cash and on receiving goods, two elements that all the sales people do not do. The training consisted of having Ms. Batchelor observe and ask if she had questions. Ms. Pikna said Ms. Batchelor did what she was asked but no more. She did not ask what she should do next. Ms. Batchelor's testimony was that Ms. Pikna showed her the office and the books and told her that she would be helping Liz Ferraz in the store setting up sales, helping with the float and doing some receiving. Ms. Batchelor told Ms. Pikna these were all things that she was familiar with from working in stores before as well as in running her own cleaning business. She had been employed as a shipper-receiver dealing with fabrics and other sewing supplies 8 or 9 years earlier.

12. Two to three weeks later Ms. Pikna talked to Liz Ferraz, the Assistant Manager, about Ms. Batchelor, and for a second time approximately two weeks afterwards. Her concern in these conversations, which Ms. Ferraz shared, was that Ms. Batchelor did not seem to be asking enough questions. Ms. Pikna testified that she had specifically mentioned to Ms. Batchelor in the interview that she needed a self-starting individual and she did not feel that Ms. Batchelor was performing in that regard. Ms. Pikna said that Ms. Batchelor was all right in her sales work; she sews and knows what she is doing about the actual products. Ms. Pikna had also told Ms. Batchelor she was doing a good job in sales. Ms. Pikna testified she received no complaints and no positive reports and therefore considered Ms. Batchelor an average salesperson. Ms. Ferraz gave very similar evidence.

13. After the end of October when the theatre group ended, Ms. Pikna said she was expecting more leadership and more communication from Ms. Batchelor. She spoke to her in her office telling her that she needed to show leadership. It was a friendly discussion and not a reprimand and not recorded in any way.

14. During the first conversation with Ms. Ferraz, Ms. Pikna said she decided to let Ms. Batchelor show what she could do for a few weeks more. On the second occasion Ms. Pikna told Ms. Ferraz that time was running out and that a decision would have to be made. Ms. Pikna complained that Ms. Batchelor was not very communicative and thought she had too many outside commitments for a management employee. She felt the note that Ms. Batchelor had left in the end of October concerning scheduling showed that she did not understand that as a management employee she would not be able to have forty-eight hours notice on all occasions.

15. Ms. Ferraz gave as an example of her dissatisfaction with Ms. Batchelor that she would have to tell her to put customers first over tidying the tables. Later Ms. Ferraz said the problem was she had to be told to tidy the tables. The only example Ms. Pikna gave was that she should not have to be told to tidy the tables. Ms. Ferraz thought that she had started showing Ms. Batchelor the cash around the end of October or the beginning of November. She said she did not show much enthusiasm when she showed her how to do the cash and closing off and in general did not show very much interest. Ms. Ferraz said that she told Ms. Pikna in November that she had the hang of it but that she did not show much enthusiasm and was not a self starter. Ms. Ferraz never talked to Ms. Batchelor directly about her dissatisfaction, leaving that to Ms. Pikna.

16. About the end of November Ms. Pikna says that she told Ms. Ferraz that if she did not see any improvement they would have to let Ms. Batchelor go as she had not yet seen enough progress. Ms. Ferraz corroborated this, but was not very clear on when Ms. Pikna told her that she was intending to fire Ms. Batchelor. Ms. Ferraz at first said that she heard about the termination before December 8, and then later said she was not sure when she actually first heard about it. She knew it was a possibility in November. Ms. Pikna's evidence suggests December was the first time she told Ms. Ferraz she intended to fire Ms. Batchelor. Ms. Pikna testified that she took the decision at the end of November to find someone else but decided to postpone informing Ms. Batchelor of this until the Christmas brunch on December 9.

17. On December 8, 1990 Ms. Batchelor discussed the possibility of unionization with another employee although Ms. Pikna denies any first hand knowledge of the discussion. However, she was informed by Ms. Ferraz on that day that Ms. Batchelor was talking about a union. Ms. Pikna testified that she said "that's kind of silly because she is supposed to be management," and, that it did not really matter because she had made her decision already and was going to let her go on Monday. Ms. Ferraz's evidence is basically corroborative. She said Ms. Pikna's response was that it did not matter because the termination was already in progress.

18. Ms. Pikna reports to Betty Lusby who is responsible for eight or nine stores, including the Burlington store. At the end of October, Ms. Pikna and Ms. Lusby went for a working lunch during which Ms. Lusby asked about Ms. Batchelor's performance. Ms. Pikna said that she could not really put her finger on it but she hoped she could do more. Ms. Pikna said that she kept no records of her observations of Ms. Batchelor because she thought that during the first three months the employee had to prove they were suitable, not that management had to prove they were unsuitable.

19. Ms. Lusby's evidence was that in approximately the middle of October she had a conversation with Ms. Pikna to see if she was training someone to replace the Assistant Manager during maternity leave. She was told Susan's training had started and that she was involved in a theatre group and had been busy but that Ms. Pikna hoped Susan would be able to concentrate more on the job when the theatre group was finished. Sometime in November they had a further conversation about the note regarding the notice of schedule changes. The subject was left that it would be very difficult to give forty-eight hours of notice especially when someone was ill. Ms. Lusby said her progress was discussed and that she was doing okay on what she was asked to do, but that she needed more work and perhaps more times spent on procedures. As well she thought more time was needed to draw her out to show her leadership because that was what they were looking for in a manager. She cannot recall any other discussion between then and December 8.

20. In cross-examination Ms. Pikna said she was not exactly sure of the day she had made the decision to fire Ms. Batchelor. She said that it was not really a one-day decision, but happened at the end of November and the beginning of December. She thought, on reflection that, it had happened before December 3, the date mentioned in the reply filed by the employer.

21. Ms. Pikna said she had another conversation with Ms. Lusby two to three weeks after the end of October and that she told her before December 8 that Ms. Batchelor was going to be fired, but she does not know the exact date. She said she did not discuss it with Ms. Lusby on December 8. She said this was because she had told her before that date that she was going to fire her and so it was unnecessary to tell her on that date. Ms. Lusby's evidence is that Ms. Pikna informed her on December 8 that she had decided to fire Ms. Batchelor and the reasons for it. Ms. Lusby says she dropped into the store between 2:00 and 3:00 p.m. on December 8, and spoke to Ms. Pikna about Susan's probation coming to an end. Ms. Pikna did not feel sure she was progress-

ing at the rate she should nor that she was showing leadership qualities needed and told Ms. Lusby Ms. Batchelor would be dismissed. Ms. Lusby asked Ms. Pikna to give her a run down of her reasons and the basis for the decision, which Ms. Pikna did. Ms. Lusby did not discuss with Ms. Pikna how she had come to the conclusion that Ms. Batchelor was not progressing fast enough or showing enough leadership. Ms. Lusby said she leaves these things to the managers of the store since they work with the people everyday. At the end of the conversation Ms. Pikna told her that Ms. Batchelor had been talking union. Ms. Lusby testified that because the discharge decision had been made she did not really react and she did not really know how much was based on the union rumors. None of this was reported to Ms. Lusby's superiors at the time. Ms. Pikna told Ms. Lusby she would look after the discharge on Monday after the Christmas brunch scheduled for Sunday December 9.

22. On the following Monday, Ms. Batchelor was ill. she called and spoke to Ms. Ferraz and said she would bring in a doctor's note. Ms. Batchelor returned to work on the 14th, Ms. Pikna's day off, and found her name struck off the schedule. She did not know why and asked Ms. Ferraz who said she did not know what was going on with the schedule. Ms. Batchelor came to work the following day, December 15, a Saturday, and worked her entire shift from 9:30 to 6:00. In the morning she asked Ms. Pikna if she could have more hours. Ms. Batchelor's uncontradicted evidence is that Ms. Pikna said she did not know and that she had not made up the schedule yet. Before 4:00 o'clock that afternoon Ms. Pikna said she wanted to talk to her and fired her. She started off saying that it was not working out, that she had to lay her off, that sales were down. She said that she did not think she could do the job in that she did not show enough initiative and self-starting ability. It was in this interview that Ms. Batchelor heard for the first time that the company had concluded she was inflexible from the note she had left about scheduling changes. Ms. Pikna also said she did not have enough hours to put Ms. Batchelor in sales as she did not have enough hours even for those who were staying. Ms. Pikna also mentioned that it was still in the three months probation. An employee who was hired at the same time as Ms. Batchelor was put into the Assistant Manager trainee position. Ms. Ferraz started her leave on January 27, 1991.

23. In cross-examination counsel asked why Ms. Batchelor was allowed to stay on at least another week after the decision was made. Ms. Pikna responded that she was waiting to see if anything would change and was trying to give her as much time as possible to show she was going to change within the probation period. To counsel's suggestion that she then had not made up her mind until after the Christmas brunch, Ms. Pikna responded "If you mean a 100 percent sure on a certain date, she was still on probation, didn't she deserve more time?" She then said she got as much time as possible because probation would have expired on December 17. In re-examination Ms. Pikna said that she told Ms. Lusby that she had already made her decision anyway and there was not much discussion on the 8th. Ms. Batchelor testified that Ms. Lusby was in the store on December 15, shortly before the discharge interview. If so, we have no evidence as to what discussions, if any, relevant to this case took place.

24. During the fall and early winter of 1990, the Burlington store's sales were not increasing at the same rate as other stores, a source of comment by upper management to Ms. Lusby at sales meetings. On December 3 or 10 Ms. Lusby had specifically been asked to look into it. She discussed this with her own supervisor, Barb Pultz, General Manager, Operations. The week after Ms. Batchelor was fired there were two staff meetings held by Ms. Lusby to deal with the problem of the volume of sales. There had been no staff meetings since September and Ms. Lusby had never before held any meetings in that store. The staff was grouped according to seniority for the two meetings. Ms. Lusby reported to Ms. Pikna afterwards that there were complaints about scheduling. Someone in one of the staff meetings asked Ms. Lusby about Ms. Batchelor and Ms. Lusby said that she had not worked out for the position for which she had been hired.

25. On December 15, Ms. Pultz heard through another channel that there was talk of a union at the Burlington store. She called Ms. Lusby on December 17 to have her tell the managers not to discuss anything with the employees about the union because it could cause problems. Ms. Lusby said that, when asked, she informed her that Ms. Batchelor had already been fired. Ms. Pultz asked if it had been because of the union and was told it was not. Ms. Pultz testified that Ms. Lusby was incorrect in saying that she had raised the subject of Ms. Batchelor. It was Ms. Pultz's evidence that Ms. Lusby raised the matter.

26. On cross-examination Ms. Pultz said that Ms. Lusby had contacted her about the middle of November and had said that Ms. Batchelor was very involved in a theatre guild and was causing scheduling problems. Ms. Pultz had responded that management people had to be flexible in scheduling and asked how her performance was otherwise. Ms. Lusby told Ms. Pultz she was following instructions but not taking initiative to find jobs herself. Ms. Pultz' advice to Ms. Lusby was that a decision would have to be made within the three months but she knew they needed an Assistant Manager while Ms. Ferraz was on leave. Ms. Pultz agreed that she would have expected to have been informed if there were further problems.

27. Ms. Batchelor heard the union's ads on the radio and phoned for more information on approximately November 20. She started talking to employees about whether they wanted to have a meeting to decide for themselves whether they wanted a union in and had gotten mainly favourable response. No cards had been signed by the time Ms. Batchelor left.

28. Prior to the date she contacted the union, neither Ms. Pikna nor Ms. Ferraz had ever commented unfavourably on Ms. Batchelor's work or said improvement in attitude or any other area was needed or her job was in jeopardy. Ms. Batchelor testified that no-one ever talked to her about lack of initiative or lack of leadership that she can recall. She says that the reason she did not ask questions was that it was all very straightforward, mainly things she had done before. She acknowledged she needed some training on the cash register as she was unfamiliar with it.

29. Ms. Batchelor testified that after the discharge the union activity died. She knew this because she called a few employees the following Monday, December 17. Ms. Batchelor suggested to some of the employees that it was a possibility that her firing was due to her union activity. Ms. Ferraz testified that talk of the union stopped once Ms. Batchelor was gone.

30. On behalf of the employer Mr. Millard argues that the sequence of events was coincidence and that it would be a fallacy to draw the conclusion that because Ms. Batchelor was fired after she called the union that she was fired because she called the union. Counsel underlines that this was a probationary employee who was considered not to have an adequate amount of initiative to be a management trainee. The purpose of probation is to see whether the person has what the company needs. He suggested that given that she was a marginal employee on probation, that calling the union could have been very well just a matter of self protection in the hope that it would come to management's ears. He argued that this was a case of the facts and not the law but that we should be able to make a clear finding of facts that no part of the motivation to fire was in response to union activity, rather than just allowing the complaint if there was any doubt about the motivation.

31. He said that Ms. Batchelor's evidence was full of "not that I can remember" and was not a very sure basis on which to build the case that there was no communication to her of any problems. She did not see a career with Fabricland and had told Ms. Pikna that. There was simply no reason for them to invest more time in her. He asked us to conclude that the employer did what they would have done even if it had not gotten the news of the union.

32. On behalf of the complainant Mr. Nelson argued that prior to finding out that Susan was talking union there had been no complaints and that she was doing what they asked her to do and that the suggestion that Susan was not working out is simply not credible. He asked us to review the discussion between Ms. Pikna and Ms. Lusby as late as the end of November. The discussion was that there was a bit more to be done but there were no alarms sounded and no action dictated at that time.

33. Ms. Ferraz testified that Ms. Pikna was going to talk to Susan Batchelor but Pikna's evidence shows none of those discussions. In the past when business and sales declined, hours were reduced. This was the first time they terminated an employee in those circumstances. There was still work for a sales clerk. Management counsel's response to this argument is that there was no evidence of a previous case of declining business and a management trainee.

34. Union counsel asked for reinstatement, full compensation and postings so that the union could have its remedies as well.

35. The Board's jurisprudence is clear that the onus is on the employer to demonstrate that the discharge was not motivated even in part in response to union activity. See among others, *Barrie Examiner*, [1975] OLRB Rep. Oct. 745. We agree with both counsel that this case turns on our findings of fact.

36. This case presents difficulties in making the findings of fact for a number of reasons. Without commenting on whether or not Ms. Pikna's dissatisfaction with Ms. Batchelor amounted to just cause, we found it credible that Ms. Pikna did not find Ms. Batchelor an ideal management trainee. Having observed the two individuals give evidence, it is clear that they do not operate "on the same wave length". We have no difficulty accepting that communication between the two was less than optimum. This factor likely played a large part in Ms. Pikna's assessment of Ms. Batchelor's performance. She had mentioned her reservations about Ms. Batchelor well before Ms. Batchelor contacted the union, and clearly did not appreciate Ms. Batchelor's objection to her scheduling practices in late October.

37. However, and very significantly, these concerns had not crystallized to the extent of any communication to Ms. Batchelor that they were serious or needed action. Even Ms. Pikna's description of her talk with Ms. Batchelor in the end of October was that it was a friendly talk, and not a reprimand in any way. An employer is not required to communicate dissatisfaction in any particular way, unless bound by a contractual provision to the contrary. There is no such contractual condition present in this case. However, failure to let the employee know there are problems is a factor to be weighed when assessing the credibility of the reasons given for the discharge. Put the other way, a discharge for unsatisfactory work performance will be much more credible if the employee had previously been told that her performance was unsatisfactory.

38. Another factor to be considered is Ms. Pikna's communications to her supervisors about her intention and decision to fire Ms. Batchelor. The decision to discharge was not communicated to the people the evidence indicated should have heard about it before Ms. Pikna received news that Ms. Batchelor was "talking union". Ms. Pikna's evidence is directly in conflict with that of Ms. Lusby on the crucial point of whether or not Ms. Pikna had told Ms. Lusby that she had decided to fire Ms. Batchelor prior to December 8, the date she heard of Ms. Batchelor's union activity. Ms. Pikna said she had; Ms. Lusby said she had not. The major reason this is important is that Ms. Pikna testified that a decision to discharge was one which would need to be discussed with her superior before action was taken, since Ms. Lusby was also responsible for the store. Yet, she later testified that she did not really discuss the matter with Ms. Lusby because it was her own decision to make. Rather, she informed her that the decision had been made. Further, Ms. Pikna's

response to Ms. Batchelor's request for more hours on the morning of her discharge, December 15, is inconsistent with her evidence that the decision to discharge had been made weeks earlier. She said she did not know yet if she could have more hours. Union counsel suggested that Ms. Pikna was waiting for the final okay from Ms. Lusby before firing Ms. Batchelor which she received when Ms. Lusby visited that store that afternoon but the evidence is insufficient to make a finding on that point.

39. Additionally, management's complaints about Ms. Batchelor were quite vague and unspecific. The only concrete example given by Ms. Pikna was that Ms. Batchelor had to be told to tidy the tables. However, Ms. Pikna found her to be a good salesperson. The original example Ms. Ferraz gave was that Ms. Batchelor had to be told to serve customers rather than tidy the tables, although she had earlier said she was doing fine as a salesperson. Later, she gave the same example as Ms. Pikna. Firstly, the complaints are somewhat contradictory. Moreover, even given that Ms. Batchelor was a probationary employee, the evidence leaves us unclear as to why discharge was the management response in this case, especially in view of the impending maternity leave. Although Ms. Pikna said that hours were dropping along with sales at that point in time, and she did not have sufficient work to keep Ms. Batchelor on as a sales clerk, there was no explanation of why Ms. Pikna's previous habit of using a combination of employee preference, skills and seniority to cut hours was not used, especially as there were no complaints about Ms. Batchelor's performance as a sales clerk.

40. When we assess these factors in light of the onus of proof, which is squarely on the employer, we find that we are not persuaded that no part of the discharge in this case was in response to the news of a potential union drive. Up until that time whatever problems management had with Ms. Batchelor had not warranted any action. At one point in her cross-examination, Ms. Pikna said that the decision to fire was not 100% final at the point in time she heard news of the union, as she felt Ms. Batchelor should be given every opportunity during the probationary period. The evidence was simply not sufficiently convincing that the additional factor of the union was not at least the straw that broke the camel's back in Ms. Pikna's decision-making process. Although there had not been a great deal of union activity by this time, Ms. Pikna was not in a position to know just how far it had gone. It is likely, in any event, that nipping any union activity in the bud was actively present in her mind when she decided to discharge Ms. Batchelor.

41. For the reasons set out above, the complaint is allowed. Ms. Batchelor is to be offered a position as a sales clerk and to be reinstated in that position forthwith upon her acceptance of that offer. She is to be compensated for the wages she would have earned as Acting Assistant Manager for the period of Ms. Ferraz' absence on maternity leave. Although we are persuaded that Ms. Pikna did not find Ms. Batchelor an ideal management trainee, we are not convinced that these concerns were so serious that she would have been removed from the position even if the company had not received news of the union. She is also to be compensated for wages as a sales clerk between the date of her discharge and the date of Ms. Ferraz' departure on maternity leave as well as the period between Ms. Ferraz' return to her position and the date of Ms. Batchelor's reinstatement or decline of the offer of reinstatement, subject to the normal principles of mitigation. The Board will remain seized if the parties are unable to agree on the amount owing and to deal with any problems with implementation of this decision that the parties are unable to deal with.

42. The notice appended to the decision is also to be posted and to remain posted for sixty days.

1. The majority of the Board has decided in this case that the discharge of Ms. S. Batchelor was in violation of the Act and that she should be reinstated. They have further awarded that Ms. Batchelor be reinstated as a sales clerk and compensated for the wages she would have earned, including wages she would have earned for some period as an Assistant Manager. They have also directed that a notice concerning employees' rights to organize be posted in the workplace.

2. I cannot agree with the conclusions reached in this matter by the majority of the Board and comment on the above mentioned conclusions of my colleagues.

3. The majority award is that there was a violation of the Act. They find that the complainant was discharged for union related activities in that management had news of a potential union drive. The only evidence of "union activity" that came before the Board was given by the complainant. It was not substantiated or supported by other testimony or evidence. No other employee came forward to support the complainant's testimony. No cards were signed or seen. No union official testified that an organizing drive was under way or even planned. Management heard about "union talk" only through rumors of a second-hand or third-hand nature. No evidence adduced about union meetings to organize employees or management meetings designed to forestall or "chill" a union drive. There is evidence that the store manager did not take the rumors seriously because Ms. Batchelor, the rumored source of a talk to another employee, was a management person who would not be eligible for union membership and because, the store manager testified, she had already decided to terminate the complainant.

4. The complainant's conclusion that "union activity" was the reason for termination is pure speculation and surmisal by the complainant. This was summarized in her testimony, in a union directed re-examination that she reached this conclusion because "it kind of fell into place".

5. There was in my estimation no substantiated evidence of union activity and it follows that no breach of the Act was proven. The evidence given by Ms. Pikna, the store manager, in a response to hearing the rumor was, "that's kind of silly she is supposed to be management" and also that "termination was already in progress". This is hardly the response expected of a management person who is determined to discharge an employee for "union activity". I don't see an anti-union bias based on this evidence. There are some far reaching consequences for the Board to find an anti-union bias on the part of a management or an interference of an employee's rights under the Act founded solely on a statement by the disciplined or discharged employee that he or she had spoken to another employee about their opinion of unions. It could even present a convenient opportunity to some employees to avoid the consequences of acts which would otherwise warrant disciplinary action.

6. The complainant was discharged for her failure to perform adequately as an Assistant Manager trainee. Evidence of the complainant was that she knew she was a management trainee. She was given special training and was observed as to her ability and attitude. During her probationary period she was judged by management to be a satisfactory salesperson but lacking in key managerial attributes that one would look for in an employee as having management potential. These decisions were taken during and at the end of her probationary period.

7. The Board majority concluded that the management complaints about Ms. Batchelor's performance were "vague and unspecific" and that the rumored union activity of the complainant was the "straw that broke the camel's back" in the decision to terminate employment.

8. It is very difficult to describe with precision a judgment about employee attitude (i.e. what person has management potential and what person does not). These decisions involve quali-

tative factors and not very many quantitative examples of behaviour may be evident. Nevertheless, examples were given in evidence that helped the store manager, Ms. Pikna in her assessment. She spoke of the complainant complaining of the timing of notice of Saturday work scheduling, of her being uncommunicative during training on job details and her attitude about expected arrival times. These are measurable factors that can form the basis for evaluating attitudes, motivation and dedication. I find nothing unusual about Ms. Pikna's statements and would not classify them as "vague and unspecific" when dealing with an assessment of employee attitude.

9. The evidence is clear, through the testimony of more senior management representatives, that Ms. Pikna had the authority to hire and fire employees. "I leave these matters to the managers" was the evidence of Ms. Lusby, District Manager. Ms. Lusby also testified that she had heard from Ms. Pikna in mid-November, weeks before the discharge, about the lack of progress of Ms. Batchelor as a trainee. Ms. Pikna also testified that she is not required to check with senior management about hiring and firing. "I do selection of people - if I'm not sure I ask my superiors - if I'm comfortable I just hire. This is the same as in terminating - more discussion - but the decision is mine."

10. The Board majority finds and I agree that management in this instance has the uninhibited right to discharge an employee without prior communication with the employee of dissatisfaction in any particular way. This employee, Ms. Batchelor, was not given written warnings or disciplinary time-off as one would argue as necessary before discharging an employee who had seniority status in a unionized workplace covered by negotiated work rules. Ms. Batchelor was counselled as heard in the evidence in what the majority also describes as a friendly meeting about her need to be more communicative.

11. Management's decision to terminate the complainant for business reasons should not be questioned and reversed by a decision of this Board which has little knowledge of the facts of the respondent's workplace and its needs. This Board has no special expertise in these matters and should not substitute for management in these areas unless it can point to some specific issues or reasons. Ms. Bachelor is certainly not entitled to any compensation as an Assistant Manager. She was in a training period at the time of discharge and judged not to be qualified for the job in the opinion of the Store Manager. Neither should Ms. Bachelor be reinstated and reimbursed as a sales clerk. She was not accepted to that position after her failure to qualify in a management function because of a lay-off at the Sales Clerk level for lack of business, according to the evidence. This was a business decision made by management and not a decision to be made by this Board.

12. The direction to management to post a notice concerning employee rights under this *Act* is entirely inappropriate. In my opinion it will be regarded as an act of overkill that will not help the Board in making a strong point in a case of a flagrant violation involving a proven case of attempted intimidation of employees or anti-union bias. The evidence that there was any union activity at the workplace or elsewhere is at the very least flimsy and certainly unsubstantiated. There was no evidence adduced to show that management in any way intimidated employees or denied them their lawful rights. The evidence is that the only person who mentioned that the discharge was for union activity was the complainant.

13. The reference to the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745 does not sit squarely here. There is a vast difference between these two cases involving the amount of union activity as well as the balance of evidence adduced by several levels of management which should leave no doubt as to balance of the *credibility*.

14. Finally, the majority award finds that, "the additional factor of the union was not at least the straw that broke the camel's back in Ms. Pikna's decision making process".

15. The majority have, in their decision put themselves into the mind of Ms. Pikna and drawn a conjectural conclusion. There is no evidence of support such a conjecture.

16. From this my colleagues have then let the conjecture flow to the conclusion that Ms. Batchelor was fired for union activity, deserves to be reinstated and reimbursed as a Sales Clerk and for a time as an Assistant Manager and then to notify all other store employees of their rights and to reassure them that they have the right to join a union. That is in the event some union had taken that initiative even though none had done so to the date of this hearing.

17. Since there was no firm or substantiated evidence of union activity that would lead to a violation of the *Act* and since management acted within its prerogative to dismiss Ms. Batchelor, I would dismiss the complaint.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE ARE POSTING THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD. AFTER A HEARING IN WHICH THE TRADE UNION AND THE EMPLOYER PARTICIPATED, THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY FIRING SUSAN BATCHELOR.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL
ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE HAVE BEEN ORDERED TO OFFER TO REINSTATE MS. BATCHELOR TO EMPLOYMENT WITH FULL COMPENSATION.

FABRICLAND DISTRIBUTORS INC.
PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 24TH day of JULY, 19 91 .

2223-90-FC Canadian Paperworkers Union, Applicant v. Grant Forest Products Corporation, Respondent

First Contract Arbitration - Volume of company proposals, their content, the rationales advanced for them, the point at which they were withdrawn or modified and the format of company's bargaining approach leading Board to find that company failed to make reasonable or expeditious efforts to conclude a collective agreement - Board left with a number of unanswered questions about company's financial justification for final offer - Final offer uncompromising and without reasonable justification - First contract arbitration directed

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

APPEARANCES: *Douglas J. Wray*, *Andre Foucault* and *Robert Kirkey* for the applicant; *Michael G. Horan*, *Peter Lynch* and *Roy Carlyle* for the respondent.

DECISION OF THE BOARD; July 16, 1991

1. On the agreement of the parties, the name of the respondent is amended to read: "Grant Forest Products Corporation".
2. This is an application under section 40a of the *Labour Relations Act* for a direction to settle the parties' first contract by arbitration. On January 29, 1991, the Board issued such a direction. We now provide our reasons.
3. The applicant union was certified on March 21, 1990 to represent approximately 200 employees who are engaged in manufacturing waferboard, oriented strand board and stabilized strand board at the respondent company's plant in Englehart, Ontario. These three products are composite structural boards of various properties and marketability which are sold primarily as substitutes for plywood. The company started production in 1982 with waferboard, and undertook a major expansion in 1987 when it built a second line for manufacturing oriented strand board and to a much lesser extent, stabilized strand board, which are both structurally superior to waferboard.
4. Since 1983, employees at this plant have been represented by another certified bargaining agent, the Grant Waferboard Employees Association, whose most recent collective agreement expired on December 31, 1989. Both parties appeared to feel that the relevant sequence of events before us encompassed the negotiations which preceded that last agreement, together with a previous attempt by the applicant to organize employees, and as a result, they led evidence in this regard.
5. The negotiations between the Association and the company commenced in May of 1987, about the time groundwork had started for the oriented strand board line expansion. Owen Little, the company's production manager and a member of the company's bargaining committee, told the Board that negotiations had started early because the company wished to have them out of the way so that it would have two years without the possibility of labour unrest. The format for negotiations was relaxed, informal, and low-key. No written proposals were made by either side. Rather, the articles of the previous collective agreement were photocopied on to pages, and the Association committee and the company committee reviewed them each in turn. If agreement was reached, that article was signed and put aside. If there was no consensus, the article was rewritten until the committees were satisfied with it.

6. Bargaining continued in this fashion until July of 1987 when it appears that negotiations tapered off. There was little or no bargaining activity between July and the beginning of December. Michael Hunter, a national organizer for the applicant, testified that the applicant was approached by the Association executive during the first week of December. It appears from Mr. Little's testimony that at that point, Peter Grant, the owner of the company, became personally involved in negotiations and several offers were made by the company during the second week of December. On December 10th, Mr. Hunter filed an application for certification with the Board and booked a meeting hall for a union meeting. On the same day, the company made an offer to employees which included a wage increase of 15.9% over two years. Mr. Hunter told the Board that this offer was conditional upon immediate ratification and upon employees not meeting with the applicant. However, it became apparent in cross-examination that this evidence was hearsay, and in light of the availability of first hand evidence in this regard, we are not inclined to place any weight on it. The company's offer was subsequently accepted by employees and the applicant did not become certified until after another organizing campaign at the end of 1989. It appears that after the applicant became certified in March of 1990, some of the members of the Association executive subsequently became members of the applicant's local executive. Shortly after certification, the company voluntarily began deducting dues and remitting them to the applicant.

7. Notice to bargain was given by the applicant on April 26, 1990, and nineteen days of negotiations were held between May and October of 1990. In October, negotiations broke down and employees engaged in a legal strike which continued at the time these hearings were held.

8. The company's negotiating committee consisted of Ron Carlyle, Pauline Edwards, Owen Little and Ken Fletcher. The union's committee was composed of Andre Foucault, Jerry Woods, Rob Kirkey, Ellis Wray, Grant Tibo, Joel Acton and Tim Williams. Mr. Carlyle, then the company's Director of Administration, and Mr. Foucault, a national representative for the union, acted as spokespersons for their respective committees. Generally speaking, both of these individuals possess considerable knowledge with respect to collective bargaining. Mr. Foucault has participated in forty to fifty sets of negotiations over the last few years, only one of which ended in a strike. These included two sets of negotiations for first contracts. Mr. Carlyle has several degrees and has taught labour relations, including collective bargaining, at a local community college. His actual face-to-face bargaining experience is quite limited but he has practical experience in other aspects of labour relations. Both testified at length before us and described in great detail a relatively sophisticated set of negotiations to which we now turn.

9. The parties met for the first time on May 8th, 1990. At that meeting, they discussed the format for bargaining. It was evident that although this was the first collective agreement between these particular parties, both sides were working from the previous collective agreement between the Association and the company. On the other hand, it was also clear that although the Association had in fact been certified, both sides considered that this was the first time employees had been represented by a "real" union. Mr. Foucault testified that employees perceived that the employer had been deeply upset and was extremely resentful of employees organizing, and that there was a price to be paid for it. There was no first hand evidence in this regard, and we are not inclined to accept this perception as a fact, but it does explain a certain tenseness on the part of the union committee.

10. Mr. Foucault explained at the outset of the first meeting that employees had certain expectations of the unionizing process which the union would endeavour to fulfill. Mr. Carlyle indicated that the company wished to improve its relationship with the union, which Mr. Foucault took to be a reference to the strains involved in the changeover in representation to the applicant. Mr. Carlyle then proposed that there be a signing off procedure familiar to him from his experi-

ence at the bargaining table and from his reading. In addition, he wished to put the signed-off articles into a computer data base system. Mr. Foucault was opposed to a formal signing off procedure as a number of articles in the collective agreement were interdependent, and he wanted the parties to be able to go back and make adjustments if necessary. In his view, his normal routine, which was simply to write "resolved" in his handwriting and the date next to the article in question, would be sufficient. Although he was not opposed to the company using a data base system, he did not feel it was necessary for the union to agree or disagree on this point as it was something the company could do on its own without the union's permission. Mr. Carlyle suggested in his testimony that the procedure he contemplated involved merely initialling agreed-upon provisions. However, it appears that he did not explain this at the time, because, he testified, Mr. Foucault did not ask for such an explanation. The parties did agree to deal with non-monetary items first. The rest of the first day of negotiations was taken up with the presentation by Mr. Foucault of the union's proposal and his explanation of them. Sometime during that day, Mr. Carlyle informed the union committee that the company would be tabling a number of its own proposals.

11. On May 14th, the next day of negotiations, the company gave the union a document one hundred and ninety pages in length which contained its proposals. Mr. Carlyle testified that the company's priorities in this regard were controlling costs, including employee benefits and premium pay, enlightened health and safety provisions, the creation of job function modules and the training associated with them. The reason there were so many language proposals, according to Mr. Carlyle, was that some of the wording in the previous collective agreement was ambiguous or overlapped with other articles.

12. The union was concerned about both the volume of proposals and about the concessionary content of a number of specific proposals. It also appeared to the members of the union committee that the company was attempting to mitigate the effect of negotiations by making proposals to counter the union's proposals, and they were concerned that some of the proposals affected the integrity and security of the bargaining unit. On the other hand, Mr. Carlyle, Mr. Fletcher and Mr. Little all testified that the company's proposals had been at least drafted, if not typed, prior to the company receiving the union's proposals, and Mr. Little told the Board that the members of the company committee did not change much in their proposals after they received those of the union. Mr. Foucault identified the following proposals as causing particular concern on the part of the union committee, some of which will be discussed in more detail below:

- a) A group of proposals which would have the effect of restricting the national union's right to attend certain union-management meetings, and which prescribed the composition and numbers of the union's negotiating committee.
- b) Changes to the recognition clause which would result in greater leeway for the company to contract out work and to use supervisors to perform bargaining unit work.
- c) Changes to the management's rights clause which appeared to be aimed at enhancing those rights and attenuating the effect of the collective agreement on them.
- d) Language which would result in the union paying any overtime premium resulting from the absence of an employee on union business. Subsequently, the company proposed that the union pay both such premium and the salary of the replacement employee.

- e) Changes which would double the length of the probationary period.
- f) Changes which would give the company the right to approve material posted on the union's bulletin boards.
- g) Changes which would allow the company to transfer employees into the bargaining unit and be credited with seniority from their date of hire.
- h) Changes in the recall from layoff provisions which stipulated that if an employee did not notify the company of a change of address or telephone number, he would be subject to termination.
- i) Amendments which would change the title of the discipline provisions to "Behaviour Modification" and would replace a reference to employees with poor performance to employees with "deviant behaviour".
- j) Changes which would replace the tool insurance coverage with a flat amount.
- k) Changes which would place caps on drug and dental benefit usage.
- l) Changes which would eliminate the payment of a premium for work on Sundays or scheduled days off.

13. In addition, the company presented the union with a thick binder of material which included a thirty-two page loss control program. This in turn included sections on leadership and administration, management training, planned inspections, job task analysis and procedures, incident investigation, job/task observations, emergency preparedness, organizational rules, accident/incident analysis, employee training, personal protective equipment, health control services, program evaluation system, purchasing and engineering controls, personal communications, group meetings, general promotion, hiring and placement, books and reports, off the job safety, definitions and general health and safety rules. The person in management who was in charge of occupational health and safety was now to be called the Loss Control Manager. The union objected to this, as it seemed to indicate that there was no priority for employee safety, as opposed to property damage or loss. Mr. Foucault also said that the union was prepared to look at loss control separate and apart from health and safety, but was not prepared to incorporate this document into the collective agreement. Eventually, the company took this document off the table, advising the union that it would be proceeding with it anyway.

14. The next three days of bargaining were taken up with the rest of the company's proposals, a response by the union to the first half of the company's proposals, the company's response to that and the union's counterproposal on all non-monetary items. Each time the company responded, the committee submitted an entire document covering all articles of the collective agreement, whether or not they had been resolved. In addition, each proposal was placed at the head of a separate sheet of paper underneath the previous language with space below it for comments. The combination of these factors meant that each time the company presented its position, committee members gave the union between 100 and 200 pieces of paper. There was some variation on this. It appears that some resolved articles were omitted from the material subsequently and some were not. In addition, the description of items was a little confusing. For example, under certain articles the company put "above language okay". This did not indicate whether there had

been any change from the previous language or the company's previous position. On May 17th the company briefly adopted the union's method of focusing only on the items in dispute for one round, according to Mr. Carlyle because the person who usually did the paperwork was unavailable. The company then reverted back to its previous method, submitting, for example, one hundred and ninety-two pages of proposals on June 13th, and a document one hundred and thirty-six pages in length on June 15th.

15. The union committee members felt obliged to review all the material submitted by the company, both to ascertain the company's position and lest they be taken to have accepted any advertent or inadvertent changes even in agreed-upon items. The result was fairly time-consuming, and Mr. Foucault made objections in this regard at regular intervals. Mr. Carlyle testified that the company used this format because the union had refused to sign off resolved articles. He was also under the impression that the company's approach reflected the procedure used previously in bargaining with the Association, although it was clear from Mr. Little's testimony that in many respects it was quite different.

16. Negotiations continued in this fashion. By June 15th, the volume and concessionary nature of the company's proposals, the unwieldiness and slowness of its bargaining format, and the lack of significant movement in the company's positions had alarmed the union. Mr. Foucault testified that it was taking the union committee almost a whole day simply to review the company's proposals and formulate a response because of the volume of paper. It was at this point that the company changed its proposal with respect to leave for union business, with the effect that the union would not only be required to pay the wages of the absent employee and any overtime premium, but the wages of the replacing employee as well. The result was that the company would pay nothing for the day's work. According to Mr. Foucault, this was the last straw for the union and the union committee decided to apply for conciliation.

17. Conciliation took place on July 31st, and the company at that time presented another comprehensive document incorporating four different typefaces. There was a legend on the front indicating that one typeface represented the previous collective agreement language, another the articles agreed upon, another new proposals, and the last was for footnotes or comments. Mr. Carlyle was a little unclear in his testimony as to whether this represented any change in the company's position or not. Initially, he told the Board that it was a proposal, rather than a summary of the company's position. When it was pointed out in cross-examination that there was no movement on the company's part, he said that it was a summary. Mr. Foucault testified that it was presented as a recapitulation of bargaining, but that in fact there were some changes buried in it. It appears that by this point, the company was using a computer, despite the fact that the union had not agreed to sign off the articles.

18. This new format was initially welcomed by the union committee members who hoped that it would clear up some of the previous confusion, but they soon found it even more difficult to review than the previous format because the typefaces were distracting. Nevertheless, the union responded on July 31st, and on August 1st presented a job ranking program. Later that day, the company presented its position, again in the four typeface format and in addition, presented a lengthy emergency preparedness manual designed to go with the loss control material it had submitted earlier for the union's endorsement. Bargaining continued on August 2nd and 3rd, and then recommenced August 8th, 9th and 10th.

19. On August 9th, the union expressed its concern that the concessionary proposals were still on the table and insisted that the company review its position again. The company responded on August 10th with a set of proposals which did not include any significant movement on the con-

cessionary items. As a result, Mr. Foucault testified, the union felt that it was negotiating with itself. Considerable evidence was led by both parties as to why and how negotiations ended at this point. The union's evidence indicated that the company refused to negotiate further because one of its committee members was going on vacation, despite the fact that the company had earlier indicated that it was prepared to negotiate in his absence, and a union committee member had cancelled his own vacation as a result. The company's evidence was to the effect that the union had indicated that it was breaking off negotiations. In any event, it appears to us that whether or not the company was prepared to continue to negotiate at that point, the session would have ended because the union objected to the company's lack of movement. Subsequently, the union called a meeting and received a strike mandate of 94%.

20. A presentation by the company's financial advisor with respect to the company's financial position was scheduled for September 13th, the next day of negotiations. Robert McLeod, a chartered accountant, presented a series of figures to the union in this regard. The union committee asked a number of questions, one of which related to the interpretation of the figures. Mr. McLeod agreed in his testimony that he had said at this point that any set of figures could be interpreted differently. Mr. Carlyle then interjected that these were facts, and offered to allow a person chosen by the union to review the company's books. He told the Board that he intended to allow the union complete access to the company's books, subject only to a confidentiality condition. Mr. Foucault testified that Mr. Carlyle invited the union to have its accountant go over only the figures Mr. McLeod had presented, an offer which would not have yielded any more information than the union already had. The offer appears to have been a spur of the moment response to the union's skepticism about Mr. McLeod's presentation, and was not referred to again in negotiations.

21. The union did not take up the offer. Mr. Foucault said that the committee's concern about the information was not that it was not accurate as far as it went, but that it was incomplete. In particular, he said, there were other companies owned by Mr. Grant or his family which were closely linked to this one, with assets passing back and forth. In his view, having the union's accountant review the figures presented by Mr. McLeod would not provide the missing information.

22. On September 13th, the company also presented its latest position on the non-monetary issues, again without significant movement on the concessionary proposals. Mr. Foucault told Mr. Carlyle that there was no point in the company coming back with a position the next day which continued to include the concessions on union business, benefits, shift premium and tool allowance, and that it would only aggravate the parties' relationship. The following day, there was an exchange between Mr. Foucault and Mr. Carlyle in which the former indicated that unless the concessionary items were removed, the union would be applying for a no-board report. Mr. Carlyle testified that the company had intended to present its reworked Sunday premium proposal that day but did not get a chance. On September 20th, the Minister of Labour notified the parties that a conciliation board would not be appointed.

23. On October 10th, the parties met in mediation. At this point, the company began making proposals in the same format as the union's, and both parties were initialling them as they were resolved. By about 9:00 p.m. that evening, all non-monetary issues had been settled. Generally speaking, most were resolved by an agreement on something close to the status quo. Shortly after midnight, the company made its first offer on the monetary items. That offer amounted to the status quo on most items, but included the proposed caps on benefits and the elimination of the Sunday premium. Wages were pegged at a 0% increase for the first year, and a 4.9% increase for maintenance employees for the second year. The latter increase consisted of the company's earlier proposal to transfer the money resulting from the elimination of the Sunday premium into wages.

In fact, the majority of employees would not have received any increase the second year as well, since only those who did not work shifts would benefit. The union had presented its monetary items at an earlier stage, and there had been no discussion of most of them since non-monetary items had been dealt with first. The company's final offer did not respond to most, if not all, of the union's proposals.

24. At the time the offer was presented to the union, there was little explanation of it. Mr. Carlyle referred to the company's difficult financial situation and advised the union that it had to understand that the company was in a sixty-four million dollar loss position. The union then cautioned to consider the offer and shortly thereafter, requested a face-to-face meeting with the company to clarify whether this was the company's final offer or whether there was room to negotiate.

25. In this second meeting, Mr. Carlyle mentioned that he had made a mistake and that the company's loss position was actually thirty million dollars. This disparity heightened the union's concerns about the reliability of the financial information from the company. Mr. Foucault then asked whether the offer was the company's final offer. Mr. Carlyle said something to the effect that no offer was final until the agreement was signed. Mr. Foucault continued to press him, and Mr. Carlyle admitted that this was in fact the company's final offer.

26. Negotiations broke off, and at a union meeting scheduled for October 11th, employees voted to reject the company's final offer and strike. Jerry Woods called Mr. Carlyle at home to advise him of this, and the strike began that evening. Mr. Carlyle made arrangements to meet with local president Rob Kirkey to indicate to the union what the company's strike protocol would be. He testified that he wanted to make sure that the union understood that benefit coverage would cease, and he also advised Mr. Kirkey that the company was not going to operate. If the company decided to operate during the strike, it would forewarn the union. The union agreed to take over the benefit coverage for employees, and the company agreed to let the union use the company's benefit number. There have been no formal discussions since the commencement of the strike.

27. It is this sequence of events which the union alleges demonstrates both that the company failed to make reasonable or expeditious efforts to conclude a collective agreement, and that the company adopted uncompromising bargaining positions without reasonable justification. At the hearing, the union withdrew an allegation that the company had refused to recognize the union's bargaining authority. The company asserted that it had made meaningful and constructive efforts to negotiate a collective agreement, and that it was willing to compromise on all issues but monetary ones, for which it had reasonable justification.

28. Section 40a(2) provides as follows:

40a.-(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

29. In *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005, the Board described section 40a as a “unique facilitative tool”, which reflects the Legislature’s acknowledgement of the significance of a first collective agreement. It does not, however, supplant the primacy of the collective bargaining process and although the section should be given a liberal construction, it was not intended to provide automatic access to arbitration in all cases where parties cannot agree. Instead there must be a causal connection between one of the conditions set out in section 40a(2) and the unsuccessful negotiations.

30. The Board has interpreted “reasonable” in both section 40a(2)(b) and 40a(2)(c) in a similar manner. In *Formula Plastics Inc.*, [1987] OLRB Rep. May 702, the Board had this to say about the meaning of “reasonable” in section 40a(2)(b):

24. But was the employer’s position taken without reasonable justification? Much depends on our interpretation of “reasonable” in this regard. Obviously the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, “reasonable” must mean something more than simply a rational relationship between a bargaining position and a party’s self-interest. This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the section as a whole, and having regard to the Board’s analysis in *Nepean Roof Truss*, *supra*, and *Juvenile Detention Centre (Niagara)*, [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.

25. Rather, in our view, the word “reasonable” imports an objective element into our consideration of the respondent’s justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent’s point of view, or even from the applicant’s. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

27. Moreover, while the Board has had occasion to scrutinize negotiations in the past, notably in the course of determining bad faith bargaining complaints, the nature of our inquiry under section 40a is significantly different. The jurisprudence developed under section 15 reflects a conscious intention to avoid reviewing the fairness or reasonableness of negotiating proposals as an exercise in itself (see for example, *Canada Trustco*, [1984] OLRB Rep. Oct. 1356). Rather, the Board’s interest on a section 15 inquiry centers on whether a manifestly unreasonable proposal indicates the presence of bad faith on the part of a party, or a failure to make every reasonable effort to make a collective agreement. To the extent that section 40a requires us to examine the intrinsic reasonableness of a negotiating position, it represents a departure from the jurisprudence which has evolved under section 15.

28. The variety and social authority of the competing interest involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

31. In *Alma College*, [1987] OLRB Rep. Dec. 1453, the respondent asked the Board not to

follow the *Formula Plastics* test, but rather to interpret “reasonable” in section 40a(2)(b) as requiring only that the employer have a legitimate, business-related reason for its position. The Board rejected that argument, and adopted the *Formula Plastics* approach both in that case and subsequently in *Crane Canada Inc.*, [1988] OLRB Rep. Jan. 13; *MacMillan Bloedel Building Materials Limited*, [1990] OLRB Rep. Jan. 58; *Bourque Consumer Electronics Service Inc.*, [1990] OLRB Rep. Aug. 821; *Venture Industries Canada, Ltd.*, [1990] OLRB Rep. Aug. 904 and *Kraus Carpet Mills Limited*, [1971] OLRB Rep. Jan. 50.

32. In *Crane Canada*, *supra*, the Board applied the *Formula Plastics* approach to the interpretation of “reasonable” in section 40a(2)(c) as well. However, it is worth noting that under section 40a(2)(b) the respondent’s bargaining position must be both uncompromising *and* without reasonable justification to trigger a first contract direction. In contrast, section 40a(2)(c) is framed disjunctively so that the failure of the respondent to make reasonable *or* expeditious efforts may result in such a direction.

33. Turning first then to the issue of whether the company made reasonable or expeditious efforts to conclude a collective agreement, we do have some concerns about the overall pattern of bargaining in this matter. Those concerns are based on the cumulative effect of the number of company proposals, their content, the rationales advanced for them, the point at which they were withdrawn or modified, and the format of the company’s bargaining approach.

34. The first element of this configuration is the unusually large number of proposals made by the company. Regardless of when those proposals were prepared, it is difficult not to see them as an attempt to offset or neutralize the union’s proposals, either as anticipated or as received. The company’s proposal on tool allowance provides a good example of this. The existing plan provided for the replacement of tools which were damaged, stolen or lost. The union proposed in addition a \$300 annual allowance to buy new tools as technology required and to replace broken or worn tools. The company proposed a \$300 allowance *instead* of the current tool coverage. By June 19th, the union had withdrawn its proposal and opted for the status quo. However, the company continued to maintain its proposal until October 10th when it, too, agreed to the status quo.

35. Mr. Carlyle initially suggested that the reason the company persisted in its proposal even after the union’s proposal had been withdrawn was that the company had not understood that the union’s allowance proposal was in addition to the current coverage and not instead of it. However, when his attention was drawn to the fact that even the company’s negotiating notes describe the union as clarifying this point on May 17th, the day after the company presented its proposal, and the company’s proposal was not dropped until October 10th, Mr. Carlyle indicated that the company maintained its position because it was better for the company from an administrative point of view. That may well have been the case. At the same time, the similarity in content of the parties’ proposals suggest that the company’s position was designed to have precisely the effect it did in neutralizing the union’s proposal.

36. Moreover, the unusual volume of company proposals in this situation cannot be explained to any significant degree by either the company’s stated goals for bargaining, or by Mr. Carlyle’s references to ambiguous or overlapping language in the previous collective agreement. The proposals went far beyond the company’s goals described by Mr. Carlyle, and did little to clear up any confusion. Indeed, in some cases the proposals reduced the clarity of an article rather than increasing it.

37. Our concerns in this regard cannot be separated from the content of a number of the proposals which involved concessions by the union, or provisions which provided employees with less than current working conditions. The scheme of the Act suggests that a firm status quo is the

foundation on which productive negotiations are based. Indeed, the rationale for the freeze provisions set out in section 79 is to provide a stable floor for bargaining, and to prevent an employer from reducing current working conditions so as to shift the locus of bargaining downwards. (See *A.E.S. Data Limited*, [1979] OLRB Rep. May 368 and *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. June 479.) Of course, we are not considering a breach of the freeze provisions in this case which involves different issues. Nevertheless, that jurisprudence is a useful backdrop in considering concessionary proposals which have a similar effect in shifting the locus of bargaining from improvements in working conditions to maintaining the current ones. In a first contract situation, that effect often raises the question of whether the company is seeking to suggest to employees that unionization has been of little or no benefit to them. As a result, proposals of this nature call for particular alertness on the part of the Board. Indeed, the Board has directed the arbitration of first contracts in a number of cases where the respondent made concessionary proposals, including *MacMillan Bloedel Building Materials Limited*, *supra*; *Peacock Lumber Limited*, [1990] OLRB Rep. May 584 and *Bourque Consumer Electronics Service Inc.*, [1990] OLRB Rep. Aug. 821. This is not to suggest that concessionary proposals will necessarily result in first contract directions. Obviously, each case must be decided on its specific facts and circumstances.

38. In this case, the existence of the Association's expired collective agreement provides a codification of the status quo in terms of working conditions for employees. As a result, that status quo is more specific and detailed than it might otherwise be. This tends to highlight the concessionary nature of some of the respondent's proposals. And while we find it somewhat disconcerting to be considering the negotiations between the union and the company in the first contract context where there have been previous contracts between the Association and the company, this case provides a graphic illustration of the wisdom of the Board's decision in *Bourque Consumer Electronics*, *supra*, where the Board found that section 40a applied to situations where it was a first collective agreement between the two parties, regardless of whether each had previously negotiated collective agreements with other parties. It was obvious that despite the base provided by the Association's agreement, the parties were experiencing not atypical first contract difficulties in developing a productive relationship.

39. The problems raised by the large number of company proposals and the concessionary nature of some of them are compounded by the fact that the reasons provided for were weak or conflicting. This is true even though we are examining this sequence of events under 40a(2)(c) rather than 40a(2)(b), since the company did eventually compromise on many of its proposals. It is obvious that one of the distinctions between the language of sections 40a(2)(c) is that the former speaks to a reasonable justification for an uncompromising position, while the latter refers to reasonable efforts to conclude a collective agreement. Nonetheless, in assessing whether the respondent failed to make expeditious or reasonable efforts to conclude a collective agreement, the reasons for its proposals are relevant in the sense that frivolous, gratuitous, or poorly supported proposals may indicate a pattern of bargaining that falls within the ambit of this subsection. Undoubtedly what constitutes reasonable or expeditious efforts will depend on the circumstances, and one would expect to see more compelling reasons for a proposal which is maintained for a longer period in bargaining than for one which is withdrawn or modified early in the process. At the same time, the existence of a significant number of proposals unsupported by cogent reasons calls for heightened scrutiny on the Board's part. This will be particularly true where the proposals address sensitive areas such as union representation or job security.

40. We note that considerable evidence was led by both sides with respect to the union's objections to the slowness of the process, and whether this had interfered with the company's ability to present its rationales for the various positions it took. After reviewing that evidence at some length, we conclude even from the company's testimony that the union's objections had little

impact on the company's conduct, and that it had ample opportunity to make its reasons for its proposals known, generally when it wished to do so. At most, the company was required to wait until the next meeting to present its reasons on two occasions. Even when that occurred, it was as much the product of when negotiating sessions started and stopped as it was the result Mr. Foucault's urgings with respect to speeding up the process. More typical is Mr. Fletcher's description of one occasion when Mr. Foucault interrupted Mr. Carlyle on the subject of loss control, and told Mr. Carlyle to pick up the pace. The result was simply that Mr. Carlyle continued with his explanation of the proposal, but spoke more quickly.

41. In this context, it is useful to look at some examples to provide the flavour of the problem.

- (a) One group of proposals made it clear that the company wished to have a hand in deciding who would represent the union in various contexts. The Board has said that a union has the right to choose its own representatives, and that this is an area in which employers may not participate or interfere. (See, for example, *McDonnell Douglas Canada Limited*, [1988] OLRB Rep. May 498 and cases referred to therein.) As a result, we would expect to see some compelling reasons for this incursion into the union's territory, reasons which were not forthcoming in this case.
- (b) The union had proposed a relatively common clause which would allow employees to take time off for union business with the company paying the employee for the time taken and the union reimbursing the company in this regard. The company proposed a provision requiring the union to reimburse it both for the absent employee wages but also for any overtime premium paid to a replacement employee. As indicated earlier, on June 15, 1990, the company modified its position so that its proposal had the effect of the union paying not only for any overtime premium but also for a replacement employee's straight time wages. The result was that whenever an employee was absent on union business, the union would reimburse the company for the absent employee's wages, and pay the full amount of the replacement employee's wages together with any overtime premiums. The company would not be required to pay any wages at all for the work performed that day. Mr. Carlyle had no explanation for this move, other than that he had not intended this result. These articles were not resolved until October 10th.
- (c) The company sought to double the length of the probationary period from three months or 90 days to six months or 120 working days, whichever was greater. Since many employees work twelve hour shifts (and thus seven shifts in a two week period), 120 working days might take in a very considerable period of time. Mr. Carlyle explained to the Board that the company was about to embark on a new training program, and that it needed a longer time to evaluate employees because an extended training period would be necessary. Both he and Mr. Little agreed in cross-examination that most employees were hired at the general labourer level and Mr. Carlyle confirmed that it takes no more than a week to train a general lab-

ourer. In that sense, the proposal seems gratuitous. The company's references to a future training plan for all employees do not adequately explain the scope and degree of this change.

- (d) The effect of the company's proposal in the area of seniority was to allow it to transfer any employee into the bargaining unit who would then be credited with seniority from his or her date of hire. (The current provision provided that seniority was retained and accumulated outside the bargaining unit for up to twelve months.) Mr. Carlyle told the Board that there were two reasons for the company's proposal; the first was to allow a more extended period of time for training first line supervisors, and the second was to provide for employees who had been removed from the bargaining unit temporarily to write training modules. Neither of these reasons explain why the proposal is drafted so as to include persons who have never been in the bargaining unit, and it is not clear why a year would not be adequate to train a first line supervisor. Mr. Carlyle agreed in cross-examination that he had not told the union in bargaining about the training rationale for the proposal, and that the module writer problem was not raised until the end of negotiations, although he subsequently changed his testimony on the latter point.
- (e) The company proposed that if an employee did not notify the company of any change of address or telephone number, he would be subject to termination. Mr. Carlyle told the union that the reason for this proposal was that the company wanted to have current addresses and telephone numbers because in one case, they had been unable to contact an employee. The previous collective agreement already provided for an employee's termination if he failed to return to work within 15 days from the date of mailing a notice by registered mail to his last known address. The company's proposal seems draconian in the circumstances.
- (f) The company proposed to replace the current title of the discipline article with "Behaviour Modification", and to replace the phrase "an employee will be counselled for poor performance" with "an employee will be counselled for deviant behaviour". Predictably, the union committee members felt insulted, and indicated to Mr. Carlyle that the language raised visions of rats and shock therapy. Mr. Carlyle then responded that it was all in the eye of the beholder if the union thought employees were rats. There did not appear to be any particular reason for these changes, except perhaps a certain degree of editorial zeal. In that sense, this proposal seems both gratuitous and likely to create unnecessary controversy at the bargaining table.

42. In general, it is possible to say that the reasons advanced for a number of the company's proposals were either weak or were the subject of conflicting testimony on the part of the company's witnesses. This is problematic particularly when combined with some of the other bargaining difficulties we have described. We say this despite the fact that we are well aware that parties will often pad their bargaining positions at the outset to leave themselves room for negotiations. In addition, we are loathe to prescribe to parties at what point proposals should be withdrawn or

modified. Bargaining is an art, not a science, involving consideration of many different factors, and employing a variety of strategic approaches. There is no one model of negotiations to which the parties must adhere, and in our view, they should be given considerable latitude in their bargaining tactics. At the same time, we are not prepared to condone excessive padding or the maintenance of weak positions for such lengthy periods of time that the effect is that reasonable or expeditious efforts to conclude a collective agreement are not being made by a party. Among other things, the Board will look at the overall pattern of bargaining under this subsection, and a pattern that suggests a party is going through the motions, however elaborately, may attract the application of section 40a(2)(c).

43. In the circumstances before us, these difficulties are further compounded by the company's negotiating style which involved the submission of large amounts of material, inevitably slowing down the process. The constant resubmission of items not in dispute and the volume of material presented at each session significantly contributed to the lack of progress. The reasons the company advanced for its format, that is, its past practise with the Association and its desire to use a computer data base, simply do not stand up to closer scrutiny. This volume of material was not submitted in the previous negotiations with the Association, and there was no need to do so to employ the use of a computer.

44. Mr. Carlyle suggested that the company's approach was necessary because the union would not sign off items. In fact, Mr. Foucault was prepared to write "resolved" and the date in his handwriting on the documents, which he felt was sufficient. We are not prepared to comment generally on the utility or sufficiency of signing off procedures in these circumstances. Certainly both the initialling of proposals and Mr. Foucault's method are common. But where the union committee members were prepared to commit themselves in writing with respect to resolved proposals, we do not see how the company's resubmission of those proposals was either necessary, or indeed provided it with any additional protection.

45. In summary then, the company made a large number of proposals, some of which included regressive changes to the status quo. The reasons for a number of those proposals were weak or conflicting, and many were dropped or compromised relatively late in the process. The form in which the proposals were made was time-consuming and confusing. The overall effect was a sort of "busy work" bargaining, in which the parties spent a great deal of time over nineteen days of negotiations only to arrive back at a position very close to the status quo.

46. It is true that there is a certain bloodless quality to these negotiations, which were civil and sophisticated on the whole. In that sense there is no "smoking gun". However, the Board has said that there is no requirement to find bad faith, antipathetic animus or egregious conduct on the part of the respondent before section 40a will be triggered (see *Nepean Roof Truss, supra*; *Formula Plastics, supra*; and *Crane Canada, supra*). Rather, as the Board observed in *Formula Plastics, supra*:

39. We note particularly that the provisions of 40a(2)(b) are not necessarily predicated on any egregious conduct on the part of an employer. There is no requirement of bad faith or anti-union animus (although these factors may be relevant) and a direction to settle a first contract by arbitration is not a penalty visited upon an employer. Rather section 40a as a whole represents the identification of a series of situations in which the Legislature has determined that a malfunctioning labour relationship requires a special mechanism to repair or strengthen it. Indeed, it may well be that some of the provisions of section 40a will apply even where the respondent's conduct stems from ignorance, inexperience or ineptitude.

47. As a result, it is not necessary for us to speculate why the company conducted itself as it did, and whether it reflected some hostile motivation or merely inexperience. Rather, we observe

that a bargaining approach which has the effect of keeping the parties running in one spot at the bargaining table instead of promoting meaningful discussion and compromise with respect to improvements in working conditions, is a source of concern in the first contract context. Having regard to the volume of the company's proposals, their contents, the rationales advanced for them, the point at which they were withdrawn or modified and the format of the company's bargaining approach, we find that the company failed to make reasonable or expeditious efforts to conclude a collective agreement.

48. The union also asserted that the company's final offer represented an uncompromising bargaining position adopted by the respondent without reasonable justification. In this regard, counsel pointed to the wage offer, which incorporated the company's Sunday premium proposal as well, and the benefits cap proposal, both of which we now set out in more detail.

49. The company proposed usage ceilings on the current benefit plans of \$2,000 per family for drug benefit and \$5,000 per family for dental benefits over the period of the collective agreement. Mr. Carlyle testified that the reason for this proposal was that there was an automatic escalator clause of 5% per year on the premium for the current coverage because there were no ceilings on usage, and the company's financial consultant had informed him that the company should be controlling its costs better in the benefit area in light of the company's financial problems which are set out below. He admitted in cross-examination that the 5% escalator would be eliminated if the ceilings were \$4,000 per year for drugs, and \$6,500 per year for the dental plan. Mr. Carlyle then indicated that the proposal had been the company's opening position. Subsequently he agreed that it had been part of the company's final offer. Although he said the company had been prepared to continue to negotiate the caps at the time it made its final offer, he acknowledged that he had not indicated this to the union, but rather had said to the union committee that it was a final offer.

50. Mr. Foucault testified that two members of the union bargaining committee would have been directly affected by the caps as they had dependents with illnesses which required extensive medication. Mr. Carlyle disputed this, although he also told the Board that the company's figures were arrived at by asking the company's finance department what the upper limit was on drug and dental benefit usage for a *single* employee on a *yearly* basis. He also agreed that the total savings from the company's offer would be roughly \$5,000 per year.

51. In addition, as noted previously, the company proposed to eliminate a premium paid to employees for working on a Sunday or a scheduled day off. This affected approximately 2/3 of employees who worked rotating shifts, mostly production workers. The premium was to be replaced with a \$2.00 flat rate for Sunday work and an amount of 65¢ an hour which would be rolled into wages. Mr. Carlyle testified that the company wished to move the money from the premium into the wage rates for recruiting purposes. It appears that on one occasion when the company had attempted to recruit maintenance employees in Elliot Lake, there were several comments to the effect that the wage rates were too low. However, both Mr. Carlyle and Mr. Little testified that they had had no difficulty in attracting production employees. Mr. Carlyle agreed that the proposal did not amount to a cost-saving to the company. There are approximately sixty-four maintenance employees who would have benefited from this proposal because they would receive the wage roll-in without being affected by the elimination of the premium. The goal of the company was that the remaining two-thirds of employees would break even.

52. Mr. Carlyle told the Board that part of the rationale for this proposal was that employees already received overtime premiums on a daily and weekly basis. However, there was no dispute that employees might work on Sundays and days off and not be eligible for overtime, depending on how many hours they had previously worked that week. Mr. Carlyle also agreed that the

company could call in employees on scheduled days off, and then reschedule them for the remainder of the week in such a way as to avoid overtime. He then suggested that the premium provided motivation for employees to absent themselves from work and then come in on a day off and receive the premium. He did acknowledge that the company had control over which employees were called in for those days.

53. The union's objections to the proposal included the fact that even for those employees whom the company anticipated would break even, there were marginal losses. In addition, employees only lost no money if there was no wage increase, since the premium had been indexed to wages. This latter fact also meant that there would be long term losses because the flat rate would not necessarily increase in the same manner as the premium would have done when wages increased. The overall effect of the proposal was that a wage increase for the maintenance employees would be financed by other employees. No compensation was provided for the premium for working on a scheduled day off. The company then came up with a subsequent proposal which utilized variable increases to wages instead of the flat 65¢. This had the effect of eliminating the marginal immediate losses the union had pointed out, but not the indirect or long term losses.

54. The Sunday premium proposal was originally designed to address that premium only. Subsequently, it became the company's wage offer. The effect of the proposal was there would be no increases in either the first year or second year of the contract for production employees, and an increase of 4.9% in the second year for maintenance employees. All other monetary items were to remain the same.

55. The company's justification for both its wage offer and the benefit cap proposals was that the company had been experiencing serious financial losses. It was apparent from the evidence presented that there were two key elements in those losses: a substantial drop in the price for the company's products and an increase in the company's operating costs, particularly the interest charges on the financing for the 1987 expansion. The evidence indicated that although prices were fairly volatile and could rise and fall even on a daily basis, there had been a downward trend since 1988. The company has an exclusive sales contract with Abitibi-Price Inc. and William Chalmers, who handles the company's account at Abitibi-Price, told the Board that the market was at the lowest point he had ever seen. He acknowledged that there were dramatic price increases listed for some months in the material provided for 1989, but he explained those as anomalies due to market fluctuations relating to Hurricane Hugo and environmental concerns about the spotted owl. More recent increases were related to the strike at this company and the temporary closure of another waferboard mill which had produced fears of shortages. Mr. Chalmers told the Board that there were seasonal fluctuations in price as well, with increases in the summer as a result of housing construction. In this regard, Mr. Foucault testified that the industry was a cyclical one, that there were high and low points, and that industry negotiators kept in mind even at the low points that they were bargaining for a collective agreement that would last for the next couple of years. There was no dispute that the company had been producing to almost full capacity before the strike.

56. We were left with a number of unanswered questions about the company's financial justification for the final offer. One of the major problems was that the financial information presented by the company was incomplete. Complete and accurate financial data is critical in this kind of case, if we are to determine whether the company's financial condition provides reasonable justification for its position. More particularly, the financial documents presented by the company both to the union in bargaining and to the Board at the hearing raised more questions than they answered. The document prepared by Mr. McLeod and given to the union on September 13th is in a somewhat unusual format. This was explained by Mr. McLeod as an attempt to make the information on it more accessible than normal financial statements and to focus in on the company's

losses. In fact, the document is rather less informative than a financial statement, and indeed is so selectively focused on the company's losses that it is not particularly persuasive. For example, Mr. McLeod acknowledged that the dollar figures that made up the cost per ton figures did not deal with the cost of production per unit which would vary with total output, and did not deal with the production increases which were within the mill's capacity. The production figures, which played a critical role in the calculation of other figures in the document, are not included on it. Mr. Carlyle explained this deficiency by saying that these figures were made available to certain employees on a weekly basis. This suggests that these employees would have had the foresight to have kept this data for the years set out in Mr. McLeod's document, having anticipated that they would need it to analyze the figures he presented. This seems somewhat unrealistic. Other missing information included a substantial figure for insurance proceeds to cover the damage from a recent fire. In addition, the percentage columns setting out the breakdown of production costs do not add up to 100%. Although this was explained to the Board by Mr. McLeod to some extent, it contributed to the document's obscurity at the bargaining table. Indeed, it appears that even members of the company's bargaining team had some difficulty understanding it.

57. Excerpts from the company's financial statements were presented to the Board at the hearing, but these were also somewhat selective. They were produced and dealt with by Mr. McLeod who did not prepare them and was initially somewhat hesitant about identifying them. The excerpts presented referred to a number of accompanying notes which were not produced, nor was there any balance sheet. This last fact is significant because, as Mr. McLeod pointed out, the statement of income merely shows whether the vehicle is going backwards or forwards, while the balance sheet provides a view of what it looks like. To determine if the company's wage offer was reasonably justified by its losses, we needed to know the complete financial picture.

58. This is particularly true since there appeared to be more than one company owned by either Mr. Grant or his family which had some role in the respondent's operating costs. We do not suggest that the mere presence of non-arm's length companies necessarily impacts on the kind of financial information required in these circumstances. However, in this case, where those other companies appeared to be involved to some extent in the respondent's financial affairs, it was important to ensure that our picture of those affairs was not distorted by their involvement. For example, the data presented both to the union and the Board to show the downward trend in prices utilized net sales price figures. These are the prices from which freight, U.S. duty, cash discounts and Abitibi-Price's commission has been subtracted. However, Mr. Chalmers agreed in cross-examination that another company owned by Mr. Grant's brothers and sisters delivers most of the Canadian loads for the company and a significant proportion of the U.S. bound loads. Given that price levels were pointed to as the key element in the company's financial difficulties, accurate information in this regard was important, and this evidence raises some question about the breakdown of those freight costs. Although the trucking company was not owned by Peter Grant, we do not find the fact that it was owned by his brothers and sisters reassuring, particularly in light of the fact that the respondent company's antecedents were in the Grant family as well. In addition, Mr. McLeod testified that approximately eight million dollars in interest charges in 1990 were related to the carrying charges for financing the expansion with respect to the oriented strand board line. In cross-examination it became clear that Grant Development Corporation, another company owned by Mr. Grant, had handled the expansion, although Mr. McLeod had some difficulty describing its role in this regard. He testified that the development company had not acted as a general contractor, although he said that it had sourced out and provided various trades and supervision. He also said that it was not a payroll company, and described it variously as a conduit for hiring people, an accounting device for managing the project with a separate set of books, and a corporate shell. Mr. Fletcher agreed in cross-examination that it now had a significant number of employees. It also appears that Grant Development Corporation handled the company's repairs

after the recent fire and performed a certain amount of ongoing maintenance for the respondent. Mr. McLeod agreed that maintenance costs had tripled between 1988 and 1989, which he ascribed to the expansion.

59. In other words, the involvement of these other companies focuses attention on the importance of complete financial information from the respondent. Unfortunately, that information was not forthcoming and what was presented was not done in a manner that inspired confidence. For example, Mr. McLeod initially gave the Board the impression that he was an independent accountant, providing financial services to the company to some extent at arm's length. He also testified that his role with respect to the company had not changed over the time of his involvement. In cross-examination it emerged that he had previously been a director of the company for three years and the treasurer for two of those years, although he had no ownership interest. He has an office next to Mr. Grant's at the plant and a large percentage of his business is providing financial services to the respondent, Grant Development Corporation, a retail outlet company owned by other members of the Grant family, and other Grant family interests.

60. In this context, we have also considered the evidence with respect to Mr. Carlyle's offer to the union to have an accountant review the financial information. In light of the circumstances of the offer, the nature of Mr. McLeod's presentation, Mr. Fletcher's testimony in this regard and the limited degree of financial disclosure on the part of the company generally, we find it unlikely that the company seriously and sincerely intended to open up its books to the union in the unlimited manner Mr. Carlyle suggested in his testimony. Indeed, if that was what Mr. Carlyle intended, he did not communicate it to the union as Mr. Foucault evidently understood that it was limited only to the information in Mr. McLeod's document of September 13th. Having regard to both the context and the limitations of the offer, we do not think it can be said that it either shores up the veracity of the company's assertions or demonstrates the reasonableness of its justification.

61. We accept that the market was poor for the company's product in the sense that prices were low at the time in question, and that the company was experiencing some level of financial difficulty. However, in the absence of more complete financial information, we are not prepared to leap to the conclusion from these facts alone that the company's offer was reasonably justified. This is in part because of the factors noted earlier, indicating the cyclical nature of the market, the volatility of prices, the relationship of other companies owned by Mr. Grant or his relatives which played a role in this company's operating costs, and the selective presentation of the financial information. However, in part our reluctance stems from the fact that these are all relative figures. For example, as noted earlier, the savings to the company as a result of the proposed benefits cap was roughly \$5,000 per year. The company's gross sales in 1989 were approximately \$56,000,000. No doubt even small economies are helpful to some extent for a company in financial difficulties, both with respect to the bottom line and in the context of keeping lenders happy. However, the adamancy with which this proposal was put seems out of proportion to the savings which could have been expected from it. There must be some proportionality between the company's position and its overall financial picture. To conclude on limited evidence that the fact of financial difficulties alone justifies this kind of final offer without a proportionate relationship between the nature and degree of those difficulties, the offer and the overall detailed financial picture, might allow parties to pull the wool over the Board's eyes. This is particularly so where even the \$5,000 saving was available to the company at a higher cap level, leaving unexplained its refusal to move on the lower caps it had proposed.

62. In this case our confidence in the company's assertions was further undermined by the fact that the company was not conducting itself in other respects as if it was subject to the degree of financial crisis it asserted. For example, Mr. Carlyle agreed that the company was continuing with

its plans to spend three million dollars over the next three years for modular training for current employees. It was not alleged that deficiencies in training played any role in the company's financial difficulties. We have no doubt that training is important, but at the same time, this plan is somewhat at odds with the financial picture the company wished to present, where a saving of \$5,000 in the benefit plans was so critical as to warrant an uncompromising position.

63. We also note Mr. Fletcher's testimony to the effect that when the company's committee originally discussed its proposals, they considered the fact that the company was in poor financial shape and had significant losses. Nonetheless, they were anticipating that they could offer some attractive wage increases. In addition, the committee members discussed the company's Sunday premium proposal at a time when they still anticipated being able to provide fairly substantial wage increases. As late as August 9th, the company had not yet reached a conclusion that there would be no increases. Mr. Fletcher's perception was that there would be a wage offer in addition to the Sunday premium proposal. He only became aware that there would be no wage increases on October 9th in discussions to prepare for the last negotiating session. We note that both the downward trend in prices and the company's recorded losses which were used to justify the final offer extended back to 1988. As a result, both were apparent even at the point at which the company was still considering proposing a substantial wage increase.

64. This last point not only casts some doubt on the company's rationale but also highlights the ambiguity in its evidence with respect to who made the decision about the final offer. It is clear from the evidence of Mr. Little and Mr. Fletcher that it was not a decision of the company's negotiating committee. Mr. Little testified that prior to the time Mr. Carlyle put the financial offer on the table, there had been no discussion of what it would be. He found out about it only when Mr. Carlyle made the offer. It was explained to the company's committee after it was made that the reason for the proposal was the financial condition of the company. The committee was not aware that it was a final offer until Mr. Carlyle said this in response to Mr. Foucault's questions. Indeed, Mr. Fletcher testified that he was fully expecting the union to come back with a counterproposal, and the committee had discussed what the union might do, and where the company had room to move.

65. Mr. Fletcher was under the impression that the decision with respect to the final offer was made by the company's directors, Peter Lynch and Mr. Grant, although Mr. Carlyle handled communications with them. Mr. Carlyle said that he had consulted Mr. McLeod, Mr. Lynch and Mr. Grant with regard to the offer, although he also said it was his own decision. Mr. McLeod, on the other hand, testified that he had no input into the offer, and was not aware of the offer until it was put to the union.

66. If the final offer was Mr. Carlyle's decision, it raises a number of concerns about his lack of information with respect to the company's financial situation. He clearly had some difficulty understanding Mr. McLeod's September 13th document, and told the Board he had not seen the financial statements before these proceedings. As late as October 10th when the final offer was presented, he made a mistake indicating that the company's financial losses were twice as high as they were. Even the corrected thirty million dollar figure was obtained by analyzing Mr. McLeod's document, Mr. Carlyle testified, although it was evident in the hearing that his familiarity with that document was limited. For example, he told the Board that this figure represented losses for a three year period between 1988 and 1991, including damage suffered from a major fire. Mr. McLeod, on the other hand, testified that the insurance proceeds had almost entirely compensated the company for the fire damage. Mr. Carlyle also agreed that he did not know how much the company had actually lost over this period in dollar terms, although Mr. Grant had told him the company had lost money for the last couple of years. As a result, if the final offer was Mr. Carlyle's

decision, it is somewhat difficult to make the connection between the company's financial circumstances and the offer when Mr. Carlyle appeared to be so uninformed with respect to the former. If, on the other hand, the final offer decision was made by Mr. Lynch and Mr. Grant, it is not clear why they did not give evidence as to their reasons. We do not feel it is necessary to go so far as to draw an adverse inference as to what their evidence might have been, as counsel for the union urged. The fact is that their failure to testify simply adds to the incompleteness of the picture in considering what the rationale was for the final offer and whether it was reasonably justified.

67. There was no dispute that the final offer was uncompromising. The only issue in this regard arose with regard to the benefit cap proposals on which Mr. Fletcher and Mr. Little indicated that the company had some flexibility. However, there is no doubt that they were included in the offer which Mr. Carlyle expressly told the union was final, and nothing was said to the union which suggested otherwise. We are well aware that parties will sometimes describe a position as final as part of the posturing that goes on during negotiations. Nevertheless, a party who represents a proposal as final in first contract negotiations may well be taken at its word. This is particularly so where as here, the respondent watched negotiations break down over the proposal and did nothing to correct the impression that it was not final. At the very least, the respondent's conduct was misleading, and tends to undermine its assertion that the benefit cap proposals were still open for negotiation.

68. We therefore concluded that the company adopted an uncompromising position in the form of the final offer, and on the evidence before us, that position did not have reasonable justification. In addition, we found that the process of collective bargaining was unsuccessful both because of the company's failure to make reasonable or expeditious efforts to conclude a collective agreement described earlier, and because of the unreasonable and uncompromising nature of the company's final offer. For all these reasons, we directed that the parties' first contract be settled by arbitration. Our findings in this regard make it unnecessary for us to rule on whether the applicant was entitled to pursue arguments with respect to section 40a(2)(d).

69. Finally, the majority of the Board wishes to address our preliminary ruling which is the subject of our colleague's partial dissent. There is no doubt that the respondent was considerably late in filing the material required by Practice Note #18, and we were singularly unimpressed with the reasons for that tardiness. In this respect, we share many of our colleague's concerns. The problem in this case is that the consequences suggested are drastic in natural justice terms, that is, that the respondent would not have been permitted to lead any evidence at all. In that sense, this case can be distinguished from both *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441 and *Philips Air Distribution Limited*, [1989] OLRB Rep. June 642 where the Board ruled against parties wishing to introduce additional evidence or supplementary material.

70. Because the consequences are so significant, we are of the view that it should be crystal clear to a respondent in these circumstances that such consequences may in fact result. Our concern in this regard has to do with the wording of Practice Note #18 which indicates that parties will not be permitted to adduce evidence of any material fact not disclosed in the material filed with the Board. In fact, the respondent in this case did *file* its reply and the other material required, even though these documents were filed late. We might be inclined to interpret this language as meaning that the material must be filed in accordance with the practice note, including the time limits set out therein, but for the wording of Practice Note #19 which stipulates precisely this, in contrast to Practice Note #18. As a result, we did not feel it was appropriate to exercise our discretion to visit such severe consequences on the respondent, where notice of those consequences was less than clear.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; July 16, 1991

1. I concur with the majority's decision in their finding under section 40a of the *Labour Relations Act* for the direction to settle the parties first contract by arbitration. My dissent is in the majority's ruling made with regard to Practice Note #18. In accordance with Practice Note #18, section 1, the union provided the respondent employer with all relevant materials as required on November 23, 1990. In accordance with Practice Note 18, section 5, the respondent employer should have filed with the Board any reply to the application within ten days from the date the application was received by the employer. Accordingly, the employer should have provided the reply on or before December 3, 1990. The reply was in fact received on December 10, 1990. A respondent's reply is to include a detailed statement identifying those statements in the application with which the respondent agrees and disagrees setting out the material facts etc. which constitute the respondent's version of the matters raised in the application. All other relevant facts etc. are to be included in the respondent's reply.

2. The Board has had the opportunity to examine the procedures required under section 48 of the Act and the Practice Note #18. In *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441, the union attempted to introduce as evidence material which was not raised in the union's application. The Board ruled at paragraph 5:

... that it would not permit that line of questioning to be pursued because no allegations of that nature had been particularized or even made in Schedule A to the application (in which an applicant is required, by Practice Note #18, to set out a detailed statement of material facts, acts and omissions on which it intends to reply) even though the union claimed that this alleged improper design was one reason why this application was brought.

3. Similar circumstances occurred in *Philips Air Distribution Limited*, [1989] OLRB Rep. June 642, at paragraph 6. The union attempted to introduce a supplementary statement to its statement which was filed pursuant to Practice Note #18. The Board noted that the time requirement under subsection 40(a)(2) states:

... has been treated by the Board as a direction to deal with first contract applications in an expeditious manner, indeed, even more so than with most other matters coming before the Board, with some sense of urgency. In order to maximize the chances of completing first contract applications within thirty days, the Board has prepared Practice Note 18 which imposes strict requirements on the parties with respect to the nature and timing of filings ...

After that ruling by the Board, the union withdrew the application on the grounds that it was procedurally deficient.

4. The Board has drawn the labour relations community's attention to the timeliness requirements in jurisdictional dispute complaints and made it clear the requirements must be met. In *Spruce Falls Power & Paper Company Limited*, [1989] OLRB Rep. June 645, the Board stated at paragraph 7:

... Practice Note #15, which adopts procedures similar to those contained in the practice notes on first collective agreement arbitration, should indicate to the community that the Board is serious in its efforts to adopt and follow procedures which will assist in the resolution and adjudication of jurisdictional disputes.

At paragraph 8, the Board stated:

Paragraph 8 of Practice Note #15 provides that parties will not be permitted to adduce evidence at the hearing of any material fact not disclosed in the material filed with the Board, except with leave of the Board. The wording of the paragraph indicates that a party who fails to comply with

the Rules and Practice Note will not be permitted to introduce certain evidence unless that party can satisfy the Board that the circumstances warrant granting leave. Although the Board may consider any factors it considers relevant, particular significance will be given to the reason why a party has failed with the Rules and Practice Note.

5. Practice Note #18, section 5, mandates the respondent to reply within ten days; the word “must” is used. A respondent cannot file nor rely on material filed after the deadline. The Board’s approach in the above mentioned cases is reinforced in its correctness when one examines *Re UAW and Massey Ferguson Industries*, 94 D.L.R. (3d) 743 (Div. Ct.). In this case the Court was required to determine whether the use of “must” should be read as mandatory or directory. In determining the issue Reid, J. stated, at paragraph 745:

... .

The word “must” is a common imperative. It is hard to think of a commoner. There is no dictionary of stature of which I am aware that accords the word any other connotation. In its presence or future tense it expresses command, obligation, duty, necessity and inevitability...

... .

The Court also stated, at page 746:

... .

Since “must” bears only one meaning, an imperative one, it is inappropriate and unnecessary to search in the context for something that strengthens it.

... .

6. Counsel for the respondent employer has relied upon *Del Equipment Limited*, [1989] OLRB Rep. Jan. 19. In that case counsel for both parties had agreed to an adjournment, but counsel for the applicant had asserted that the Board was required to complete the hearing within thirty-days of receiving the application. In that case, the delays which ate up the scheduled hearing dates were devoted to settlement talks. Further, the applicant was partly responsible for the delay in hearing the case within the thirty-day limit. Counsel for the employer relies upon the words of the Board where it states, at paragraph 17:

... To have the legislation operate in such a draconian manner would make a mockery of natural justice and fairness and would be inimical to the development of good labour relations between the parties. The legislation does not specifically abridge the rules of natural justice or fairness, and where the legislation has not specified any result, much less, such a startling one, we cannot accept that this was its intent.

7. These statements by the Board were made in regard to an assertion by the union that if the Board cannot complete the hearings within the time period, then a first contract arbitration should be directed. These comments were not made with regard to the time limits for the respondent’s reply to the applicant’s application.

8. It cannot be said that natural justice has been denied the respondent when the respondent’s counsel did not file the application within the specified time periods. Counsel for the employer states in his letter to the Board of December 11, 1990 that prior commitments precluded travel to the employer’s site to meet with the employer’s bargaining committee. These circumstances are similar to the circumstances when counsel requests an adjournment on the grounds that counsel has a prior commitment. The Board has repeatedly stated, for example, in *Teledyne Industries*, *supra* that the Board will not grant an adjournment unless it is on the consent of the parties or if there are exceptional extenuating circumstances. In this situation, it is simply unac-

ceptable for counsel to claim he could not prepare the reply within the time limits because the counsel had a prior commitment. There is a plethora of management labour lawyers in this province and an employer is not entitled to relief if it hires one who is unable to accommodate its needs and the *Act's* requirements.

9. As the above cases illustrate, when the union has failed to comply with Practice Note #18, the union is precluded from introducing as evidence that evidence which would rely on material facts not submitted. This is simply a case of "what is good for the goose is good for the gander" and as the Board is a non-partisan neutral body, it must rule that the employer cannot rely on any evidence other than that submitted within the time limits.

0284-91-R Harrow Ambulance Employees Association, Applicant v. Harrow Ambulance Service, Respondent

Certification - Membership Evidence - Trade Union - Trade Union Status - Board finding employees' association to be trade union within meaning of the *Act* - Most association members filling out membership cards prior to official existence of association - Whether membership evidence valid - Board finding that employees' actions at association meeting of ratifying constitution, confirming officers, setting dues and authorizing certification application sufficiently confirmatory of membership to rectify situation - Certificate issuing

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. A. Correll* and *P. V. Grasso*.

APPEARANCES: *Jo-Ann Skomash* for the applicant; *N. W. Richard Smith* for the respondent.

DECISION OF THE BOARD; July 5, 1991

1. This is an application for certification in which the parties, through a Labour Relations Officer were able to agree on all the issues between them. As it had not previously proved its status as a trade union the Board called upon the applicant to establish its status as a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

2. Jo-Ann Skomash, President of the applicant, Harrow Ambulance Employees Association, gave evidence to support the contention that the applicant was a trade union. This evidence was uncontradicted and is summarized below.

3. In approximately October, 1989, due to dissatisfaction with scheduling issues, employees of Harrow Ambulance Service began to discuss among themselves what could be done about their conditions of employment. Conversations went on with employees of other ambulance services as well and the idea of forming their own employee association began to have currency. Minutes of an October 20, 1989 meeting disclosed that:

The Harrow Ambulance employees met to discuss the formation of an association for the purpose of bargaining with the management of Harrow Ambulance Service... An agreement was reached to pursue the formation of an association.

Meetings with management to discuss terms and conditions of employment were held on October

24, 1989, and April 20, 1990. Exactly a year after the initial meeting, minutes of an October 20, 1990, meeting record:

Association position of President and Vice-President were filled by Jo-Ann Skomash and Elwood Defour respectively. It was agreed upon to combine the position of Secretary and Treasurer into one position, to be filled by Lisa DuMouchelle.

Present at that meeting were several employees, all of whom signed membership cards in 1991. Early in 1991, the employees started trying to get legal status for their association. Ms. Skomash explained that they always had access to members of and management and were able to talk to them but they did not feel that they had enough say without legal status. They wanted to have their own voice so they applied independently for certification rather than affiliating with one of the established unions.

4. In February 1991, after talking to another group (employees of another employer) who had applied for certification, membership cards in the following form were made up:

THE EMPLOYEES ASSOCIATION OF HARROW AMBULANCE SERVICE

APPLICATION FOR MEMBERSHIP DATED _____

SURNAME: _____ GIVEN NAMES _____
(please print)

ADDRESS: _____

PROFESSION: _____ PHONE #: _____ (OFFICE)

CITY OR TOWN _____ (HOME)

EMPLOYER: _____

ADDRESS: _____

I hereby make application to become a member of the Employee's Association of Harrow Ambulance. In doing so, I of my own free will and accord, hereby authorize The Employee's Association of Harrow Ambulance Service, or its representatives, or officers, to act for me as Collective Bargaining Agent in negotiating the relationship in all matters pertaining to rates of wages, hours of work and all other terms and conditions of my employment with my employer.

SIGNATURE: _____

INITIATION FEE: _____

SIGNATURE WITNESSED
AND FEE COLLECTED BY: _____

5. Starting in February 1991 and continuing up to shortly before the application was filed

on April 24, 1991, cards were signed and a dollar collected from employees. About the same time employees started collecting the cards, they became aware of the need for a constitution and worked one up from a model from another ambulance employees' association.

6. The objects of the association as set out in the constitution are:

Article 2.01 -

- (a) To regulate relations between the employees and their employer;
- (b) to negotiate and enter into a written agreement with the employer containing provisions respecting terms and conditions of the employment of employees;
- (c) To promote and achieve improved terms and conditions of employment for the employees of the Harrow Ambulance Service;
- (d) To establish effective means of ongoing communication between employees and the employer;
- (e) To promote the interests and unity of employees.

Article 3.01 states that membership is open to all employees of the Harrow Ambulance Service except those employed in a managerial capacity or in a capacity confidential to labour relations matters. In Article 14.01 of the constitution the application for membership fee is set at one dollar. Article 15.01 provides that the Constitution shall be presented at a general meeting of the Association for acceptance. Article 16.01 provides as follows:

Article 16 - Transitional

During the first year of the operations of the Association and in the period between the ratification of this constitution by a majority vote of the membership of the Association and its first annual meeting the negotiating committee shall consist of those appointed by the Executive of the Association.

7. A general meeting was held on March 31, 1991 at which over 75% of the employees of the ambulance service were in attendance. All but two had already signed membership cards in the form set out above. One signed on that date. The remaining person signed on April 17, 1991. The constitution was read page by page and adopted as ratified by a majority of the people present. This meeting was the first time that others than the officers of the organization had seen the constitution. Those present were asked if everyone was in agreement, if there was any problem with the document; no objection was raised.

8. The meeting was held open to nomination for change of officers from the three who had been serving as officers, but none was made. The three people then serving were confirmed by the membership as President, Vice-President and Secretary/Treasurer by show of hands.

9. At the general meeting the subject of dues was discussed and the employees decided there would be no dues until the process of certification had been completed. A resolution was passed setting the amount at 1 hour's wages per month.

10. As authorization to apply for certification, a resolution was passed at that time that "All papers are to be sent the 1st week of April to legalize the Association." A bank account was opened on April 22, 1991 with a small deposit.

11. We are persuaded that the steps taken to form the Harrow Ambulance Employees

Association were sufficient to establish it as a trade union under the Act. The evidence showed that those present at the March 31 meeting entered into the necessary contractual relationship one with another so as to create an “organization of employees”. The constitution’s objects are consistent with the Act’s definition. The officers were elected according to the constitution, the constitution was put before the membership, read clause by clause, adopted and ratified in one process. The dues were set, being the only obligation other than the \$1.00 membership fee imposed by the constitution on members as individuals. Accordingly we find that the applicant falls within the definition in the Act of a trade union namely:

1.-(1) In this Act,

(p) “trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

and is entitled to a declaration that it is a trade union under the Act. See *Laval Tool and Mould Ltd.*, [1987] OLRB Rep. Oct. 1281 among others.

12. Most of the members of the Association filled out membership cards prior to the official existence of the association as an organization with enough formality to identify the terms to which each member was binding itself. This raises the issue of the validity of this membership evidence. However, a large majority of those people attended the meeting on March 31 and gave their approval to the constitution, as well as confirming the officers who were then serving. There is a substantial amount of precedent to the effect that other activities consistent with membership will rectify the problem of membership evidence signed prior to the adoption of the constitution. For instance in *Proctor Lewyt Division of S.C.M.*, [1969] OLRB Rep. Sept. 760 the Board stated:

It goes without saying that once a trade union has come into existence, future members need not confirm or ratify the existing constitution. However, where persons sign application for membership in an organization which has not come into existence at the time the applications for membership had been signed, there must be some subsequent act consistent with membership after the formation of the organization has been completed in order to satisfy the Board’s membership requirements. Such act consistent with membership may be the participation in the meeting held to ratify the constitution or the signing of an affirmation of membership after the constitution had been ratified.

We find that the actions of ratifying the constitution, confirming the officers, setting the dues and authorizing an application for certification, all of which were done at the meeting of March 31, are sufficiently confirmatory of, and consistent with, membership to rectify the situation. The minutes establish who was present and thus the Board is able to be satisfied that this was done by individuals who had earlier signed cards. These steps fall within the following quote from *M. Loeb Limited*, [1962] OLRB Rep. May 69, which is the source of the line of jurisprudence that discusses the issue in this case:

Where evidence of membership in a trade union submitted in support of an application for certification consists of application cards, signed, and payment of initiation fees, prior to the time that the applicant came into existence as an organization, the Board does not regard such evidence as valid evidence of membership in the absence of other evidence that the alleged members did some other act consistent with membership after the application was formed, or in the absence of some motion by the applicant rectifying the membership of persons who applied for the membership prior to the applicant being formed.

13. Given that all the other issues were settled, we are able to make the following findings as well. Having regard to the agreement of the parties, the Board further finds that all employees

of the respondent in the Town of Harrow, save and except supervisors, persons above the rank of supervisor, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 7, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

3281-90-G Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Ideal Railings Limited, Respondent

Construction Industry - Construction Industry Grievance - Discharge - Grievor failing to report for work and failing to notify employer of absence - Employer relying on culminating incident to justify discharge - Although grievor's record far from exemplary, Board not satisfied that prior to culminating incident grievor was employee perched precariously on edge of discharge even for the most minor infraction - Grievance upheld in part - Ten day suspension substituted for discharge - Reinstatement with compensation ordered

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. A. Correll* and *P. V. Grasso*.

APPEARANCES: *N. L. Jesin*, *Ron Balkissoon* and *Shamshir Gill* for the applicant; *Nancy A. Eber* and *James D. Church* for the respondent.

DECISION OF BRAM HERLICH, VICE-CHAIR AND BOARD MEMBER P. V. GRASSO; July 26, 1991

1. This is a referral of a grievance concerning the interpretation, application, administration or alleged violation of a construction industry collective agreement pursuant to section 124 of the *Labour Relations Act*. The applicant (also referred to as the "union") claims that Shamshir Singh Gill (also referred to as the "grievor") was discharged from his employment with the respondent (also referred to as the "employer" or the "company") without just and sufficient cause.

2. Ideal Railings Limited is a manufacturer of wood and metal railings which it also installs, largely in residential construction projects. At the time of his discharge the grievor was working as an inside installer of wood railings. During the period in question business appears to have been quite slow to the extent that employees such as the grievor were working only periodically on an as needed basis. Consequently, employees were not regularly reporting for work but rather were contacting or being contacted by the employer to determine whether or to be informed that work was available on any particular day.

3. On February 18, 1991 the grievor contacted Joyce Dixon, the employer's office manager, to determine whether there was work available for him the following day. She advised the grievor that she was unsure whether work would be available and that she would call him back. By

about 6 p.m. the grievor had not heard from Ms. Dixon so he called her back and was told to report for work the following day. Later that night the grievor telephoned the president and owner of the company, James Church, at his home and was again advised to report for work the following morning.

4. The grievor did not report for work the following day. He testified that he felt a little sick that day. He could not really explain his failure to notify the company of his absence and did acknowledge that it was preferable for an employee scheduled to work to notify the employer of an absence, but claimed that such notification would be of little value unless received before 8 a.m., the time that installers normally leave the workplace for the particular job site.

5. Two days later the grievor was telephoned by Gurmit Singh Gill, a fellow employee, who, with the grievor's permission, had gone to the workplace to collect their paycheques. The grievor was told that although neither he nor Mr. Gill had been called in to work, there were employees junior to both of them who had. The grievor called the union and as a result of that conversation went to the workplace to see who was actually at work. In the parking lot of a gas station across the street the grievor encountered Mr. Church and a conversation ensued and continued in the employer's parking lot. At some point(s) Mr. Gill and another employee may have joined the conversation. Although the evidence offered by both parties in respect of this conversation was vague and hazy at best, we are satisfied that the grievor voiced his displeasure at having discovered that junior employees were working. (The parties agreed that, subsequent to this discussion, grievances were filed on behalf of the grievor and another employee. The grievances involved questions of seniority and who was working on February 21, 1991. They were ultimately resolved.) On the other hand, while we are satisfied that Mr. Church asked the grievor where he had been for the last couple of days (he had not been called in to work subsequent to the day he did not report), we are not satisfied that the grievor indicated any causal connection between drinking and his failure to report for work the previous Tuesday.

6. By letter dated the following day, February 22, 1991, signed by Mr. Church, the grievor was discharged as follows:

Due to your poor work record, your employment with Ideal Railings Ltd. is terminated, effective immediately.

7. The employer argues that (despite any explicit reference to it in the letter of discharge) the grievor's failure to report for work and his failure to so notify the company on February 19, 1991 constitutes the culminating incident and that, in view of his disciplinary record, discharge is warranted.

8. In a preliminary oral ruling (reasons subsequently provided in a decision dated April 29, 1991) the Board (differently constituted) dismissed the union's motion based on the claim that the employer's letter of termination did not refer to the culminating incident and absent such reference any attempt to rely upon the culminating incident therefore constituted an improper alteration of grounds. The Board ruled that the letter of termination may reasonably be read to include the alleged culminating incident and that, in the circumstances, it cannot reasonably be said that the company is seeking to "alter the grounds" for the termination.

9. In light of the evidence we heard, the union renewed this line of argument and asked that we reconsider the ruling of the previous panel. The union relied primarily on Mr. Church's evidence that he had contemplated including an explicit reference to the culminating incident in the termination letter but decided not to do so on the basis of advice provided him by some unidentified source (not his current counsel). Notwithstanding that evidence Mr. Church also testi-

fied that he relied, inter alia, on the culminating incident in deciding to discharge the grievor. Even assuming (and we are far from convinced) that this is an appropriate case for the Board to reconsider its decision, we are simply unpersuaded that the evidence relied upon by the union should lead us to any conclusion diverging from that of the previous panel. We are satisfied that the employer relied upon the culminating incident and that the letter of discharge can be taken to refer to that incident.

10. This brings us to a consideration of the culminating incident itself and more specifically whether it was worthy of discipline. There is no dispute that the grievor failed to report for work and failed to notify the employer of his absence on February 19, 1991, a day he had been advised to report for work.

11. The union did not dispute that, as a general matter, an employee failing to report for work and failing to notify the employer of his absence would be subject to discipline (see for example *TRW Vehicle Safety Systems Division* (1990), 13 L.A.C. (4th) 381 at page 390). Notwithstanding that, it argues that discipline is unwarranted in the present case since whatever policy the employer may have in regard to absences and notification was inconsistently applied, if at all, to the grievor and to other employees.

12. Joyce Dixon testified that the employer has no formal procedure regarding absences and acknowledged that there were instances in which a failure to report and notify did not result in discipline. Although Edward Cole, the employer's former operations manager, testified that employees not reporting for work were requested to call in, he too acknowledged that there were instances where neither the grievor nor other employees were disciplined following failures to report and notify the employer of their absence. Those instances were confirmed, at least in relation to the grievor, by Mr. Church. And while there was no dispute that the grievor and other employees had previously been absent without prior notification to the company, we were certainly not presented with any evidence, apart from the culminating incident in this matter, of disciplinary action in such cases either against the grievor or any other employee. Apart from the *viva voce* evidence of the company witnesses, which was not consistent on the point, we were not provided with evidence of any clear company policy or rule having been communicated to employees.

13. However, while the evidence just recounted suggests there is much merit in the union's position, we should add that both the grievor and Mr. Gill, who testified on behalf of the union, seemed to acknowledge that their understanding was that an employee who was going to be absent should call in to notify the employer. They both appeared to agree, however, that such a call would be futile if it came after the installers left the workplace for the job site (around 7:30 a.m.).

14. In addition the company relied on a document dated December 21, 1988. Although not asserted to be part of the grievor's disciplinary record, the employer says this document demonstrates the grievor was aware of the company policy regarding absenteeism and notification of absences. In this document the grievor was placed on a "60-day probationary period" in respect of his attendance; it goes on to provide:

... No absenteeism will be accepted except in the following cases:

1. Court Appearance - Must show proof of date and time of appearance request.
2. Immigration Appearance - Must show proof of request to appear at Immigration, showing date and time.
3. Sickness - Must have note from Doctor to cover time off.

The first two items above must be presented before the date of appearance.

15. While this document does not explicitly refer to any requirement of advance notification for absences in circumstances like the culminating incident, we are satisfied based on it and on other evidence before the Board that the grievor had been made aware that his attendance, and least in some generalized fashion, was a concern for the employer. Consequently, considering all of the evidence just reviewed we are persuaded that, even absent any consideration of the grievor's disciplinary record, some discipline, however marginal, was warranted in relation to his most recent absence and failure to notify.

16. This brings us to the final issue in this matter. Considering the grievor's disciplinary record, was discharge an appropriate penalty or would it be just and reasonable in all the circumstances to substitute some other penalty for the discharge? The grievor's disciplinary record, as relied upon by the employer, is as follows:

December 6, 1988:	written warning	re attendance and lates
June 7, 1989:	written warning	re lates
April 9, 1990:	5 day suspension	assaulting supervisor
May 22, 1990:	written warning	re attendance
August 7, 1990:	3 day suspension	driving company vehicle while license suspended
August 1990:	oral warning	re work performance
February 1991:	oral warning	re work performance

17. There was some dispute regarding the accuracy of this disciplinary record. The grievor for example, did not recall receiving the May 22, 1990 written warning. Neither, however, did he deny it and the union did not seriously challenge its inclusion in his disciplinary record. The same cannot be said of the two more recent oral warnings. The "record" in respect of these two instances consists of written notations on the grievor's file as follows. In respect of the August 1990 incident there is a typed document which reads:

Aug/90

Al Grundy from Derbymont called in to report that one of our employees - S.S. Gill, for no apparent reason had become abusive and rude while working on his site.

He requested that we not send him back to the site again, as he would not be allowed access.

When I questioned Mr. Grundy, he was so upset that his voice was shaking. He appeared to be physically afraid of S.S. Gill.

He stated that the employee in question had verbally abused him and threatened him.

Singh was warned.

“J. Dixon”

18. There was no evidence that a copy of this document had been provided to the grievor or the union prior to the commencement of these proceedings. Furthermore while the document indicates a warning was issued, this was allegedly done by Mr. Church and not by Ms. Dixon. Mr. Church's evidence was that he spoke to the grievor regarding the incident in question but that he could not recall what had transpired during that conversation. The grievor, while he recalled the event in question, had a different view of the events and gave no indication of having understood that discipline was being imposed on him at the time.

19. The February, 1991 incident which the employer claims resulted in a warning is recorded in a handwritten document on the grievor's file as follows:

Feb/91

Albert from Eden Oaks called complaining about the quality of workmanship of Singh & Gurmit. They were doing a very poor job of installing the nosing [sic] on lots 82 & 87. He said he didn't want them working on his site anymore. He said Singh was mouthy.

“Jim”

20. Again there was no evidence that a copy of this document was provided to the grievor or the union at the time. Mr. Church testified that he discussed the matter with the grievor and told him to “take it easy”. The grievor denied receiving any disciplinary warning and Mr. Church acknowledged that discipline was not discussed at the time.

21. These two alleged warnings highlight some of the difficulties employers may face in insuring that oral warnings become part of an employee's disciplinary record. For while the events in question may well have warranted the imposition of warnings, we are simply not satisfied that any discipline was actually imposed. Furthermore, even assuming that the warnings were imposed, the failure to clearly communicate that fact to the grievor at the time and consequently give him the opportunity to challenge that discipline under the collective agreement precludes the company from now relying on those incidents as part of the disciplinary record. While it may appear somewhat incongruous at first blush, there is nothing inappropriate with keeping a (more than clandestine) written record of oral warnings and providing a copy of same to an employee, particularly where there is any contemplation of relying on such discipline in the future. Consequently, we are not prepared to accept the August, 1990 and February, 1991 oral warnings as forming part of the grievor's disciplinary record.

22. Even without the inclusion of these two warnings, however, the grievor's record is far from exemplary. It contains two suspensions in relation to serious disciplinary offenses, albeit unrelated to the culminating incident. In addition, it is clear that attendance related difficulties date back to December of 1988. Notwithstanding this, we are not satisfied that prior to the culminating incident the grievor was an employee perched precariously on the edge of discharge even for the most minor infraction. We say this for a number of reasons. First, while there is obviously a history of attendance related difficulties, there is also an indication of improvement. For example, Mr. Church acknowledged that although it had been a difficulty in the past, the present incident was the first of an absence and failure to notify warranting discipline since late 1988 or early 1989. Similarly, the employer's own disciplinary response to the grievor in purporting to impose oral warnings demonstrates that it was not of the view that the grievor was on the verge of discharge.

23. In all of the circumstances and considering as well the grievor's significant service with the employer, we are of the view that a suspension of 10 working days is just and reasonable and we hereby substitute such a penalty for the discharge imposed by the employer. We should note that while we have concluded that the grievor was not previously perched on the edge of termination, he may well be in that position now and we are confident that he shall govern himself accordingly. The grievor is to be forthwith reinstated to the position he occupied prior to his discharge with no loss of seniority and with full compensation subject to the suspension imposed. The Board will remain seized in the event the parties are unable to agree as to compensation or any other issue arising out of the present award.

DECISION OF BOARD MEMBER W. A. CORRELL; July 26, 1991

1. I cannot agree with the majority award to re-instate the grievor with a ten day suspension.
 2. The employment record of S. Gill includes written warnings, a three day suspension and a five day suspension. The disciplinary actions taken are for a history of belligerence, poor attendance and failure to notify the company of intended absences.
 3. Employees claim specific rights in terms of warnings of impending discharge so that they are not surprised by that final act. These claims are for a clear culminating incident and progressive discipline as a corrective action to aid rehabilitation.
 4. Employees also have to accept responsibilities and these include consistent attendance at the work place and on time. It also includes some respect for authority and recognition of the right of a customer for quality work delivered in a timely manner.
 5. The employer's work place is not a sophisticated organization where employees work in one place under close supervision with rigidly applied rules. In this case the company does not have a lot of options and it must rely on employees to help service a highly competitive market. Service to other contractors must fit into the tight schedules of other sub-contractors in the residential construction industry.
 6. An employee who has a record which includes 36 lates in six months, failure to report to work as scheduled, failure to notify of intended absence, a physical attack on a supervisor, an abusive and threatening approach to customers, cannot be classed as a desirable employee. Suspensions have not rehabilitated Mr. Gill and he should have clearly understood from his talks with the Company's owner that he had stretched his credibility to the final limit.
 7. I am not convinced that the grievor's attitude to his job will change and I would have upheld the discharge.
-

2687-90-OH Eric Dagenais, Complainant v. PCL Constructors Eastern Inc., Respondent

Health and Safety - Complainant health and safety representative laid off and alleging breach of section 24(1) of the *Occupational Health and Safety Act* - Board not satisfied with reasons proffered by company for selecting complainant for lay-off - Complaint upheld - Reinstatement with compensation ordered

BEFORE: Susan Tacon, Vice-Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

APPEARANCES: *David McKee, John Cartwright* and *Eric Dagenais* for the complainant; *Norman Keith, David Gowling, Vincent Panetta* and *Anthony Vedlin* for the respondent.

DECISION OF THE BOARD; July 11, 1991

1. This is a complaint alleging violation of Section 24(1) of the *Occupational Health and Safety Act* ("OHSA").
2. At the hearing, following the evidence and submissions from counsel for the respondent, the Board gave the following oral ruling.

The Board has carefully considered the submissions of counsel for the respondent and is unanimously of the view that it is not necessary to call upon counsel for the complainant for representations.

This complaint alleges that the complainant was laid-off in contravention of section 24(1) of the OHSA. The Board agrees with counsel for the respondent that the issue of the status of the complainant as steward is not relevant to the determination of this complaint except perhaps with respect to remedy. Counsel for the respondent has referred to several Board cases dealing with issues such as the reverse onus, the standard of the burden of proof, and the Board's approach in dealing with health and safety complaints. The Board does not disagree with the principles enunciated in those cases. The issue that the Board must here determine, as in each such case, is whether the *reasons* for the company's conduct or decision (whether dismissal, suspension or other penalty) were in any way related to the complainant's status as a health and safety representative and his activities as health and safety representative. Simply put, it is the *reasons* proffered by the company for lay-off, in this instance, which must be subject to Board scrutiny.

In assessing the credibility of the witnesses, the Board has had regard to the usual factors going to credibility. The Board does not agree with counsel for the respondent's characterization of the credibility of the complainant and D. Cartwright. However, in the Board's view, little ultimately turns on this difference. Rather, the Board intends to focus on the reasons given by the company for the selection of the complainant for lay-off and the evidence of the company's witnesses in that regard. The Board does not intend to review that evidence and the Board's findings of fact in detail but will give some illustrations.

The thrust of T. Edginton's evidence was that the complainant was a skilled carpenter; T. Edginton (a foreman for whom the complainant worked) had no complaints with respect to the quality of the complainant's work. T. Edginton had some concern with respect to the complainant's speed but that concern was not significant enough to progress beyond one informal conversation of a general nature with the complainant. R. Metro (the complainant's foreman at the time of lay-off) as well had no complaints with respect to the quality of the complainant's work; he characterized the complainant as average and, even with respect to speed, did not suggest the complainant was the slowest in the crew.

The Board at this point must comment with respect to R. Pennoyer's testimony. R. Pennoyer

(area superintendent) stated that R. Metro had tried to lay-off or get rid of the complainant on at least one occasion before the lay-off in January 1991 but that R. Pennoyer had dissuaded him. This testimony is not corroborated by R. Metro. Indeed, in response to a question of R. Metro to the effect "if a carpenter on your crew was no good, would the response be to lay him off", R. Metro stated that he had "never been in that situation". The Board does not accept R. Pennoyer's version of events but that testimony, of itself, also raises suspicion with respect to the company's decision to lay-off the complainant.

The Board is not hereby suggesting that the respondent has a broad or flagrant anti-union animus or anti-union health and safety animus. There is evidence to suggest that the respondent was safety conscious. That evidence, however, is *not* determinative of the issue before the Board, namely, in *this* instance was the selection of the complainant for lay-off at least in part motivated by the complainant's health and safety activities and his status as a health and safety representative. The Board would also note that the evidence with respect to the company's health and safety record falls far short of establishing the proposition that the company was so safety conscious that it would never violate section 24(1) of the OHSA or that the company could be presumed not to have violated the OHSA in this instance.

It is not in dispute - indeed the respondent's evidence clearly establishes - that the complainant was a knowledgeable, conscientious health and safety representative who took his responsibilities seriously but went about those duties matter of factly. In his testimony, the complainant did not try to exaggerate his activities or the responses of the various company officials. The Board is also satisfied that there was some friction between R. Metro and the complainant over a period of time relating to the complainant's health and safety activities and the fact that those activities necessitated the complainant's absence from his job as a carpenter and impacted on the productivity of R. Metro's crew.

At the time of the selection of carpenters for lay-off then, the Board must be satisfied that the company's decision was *solely* based on the complainant's alleged poor work performance. The evidence of the lay-off decision-making process, however, is somewhat sketchy and not satisfactory. The complainant was an average carpenter, at the very least, and a conscientious health and safety representative. There had been some tension between R. Metro and the complainant with respect to the complainant's health and safety activities. R. Metro testified he was instructed to select some crew members for lay-off. He selected four, including the complainant. One of those retained, however, was not retained by R. Metro because R. Metro considered that carpenter particularly good. That individual had only recently joined R. Metro's crew. The import of R. Metro's testimony was that he followed the direction of the assistant superintendent, S. Lopez to retain that carpenter (DaSilva). S. Lopez did not testify and apparently has been transferred out of Ontario. Even apart for this, though, there was no detailed explanation of the criteria used for the decision to retain or release the crew members either at R. Metro's level or at the level where the time cards of those initially selected for lay-off were "placed on a table" for consideration by other foremen. The Board has simply the bald assertion that the complainant was selected because of his poor work performance. The Board need not repeat its earlier comments to the effect that the thrust of the testimony of witnesses called by the company (excluding R. Pennoyer whose testimony is rejected on this point) was that the complainant was *not* a poor carpenter or poorer than everyone else on the crew or even poorer than those who were retained following the January 9 lay-off. Beyond this as well, the fact remains that the complainant's status as health and safety representative *was* the subject of discussion at the "cards on the table" level. The company's witnesses stated that the question was asked as to whether the complainant had any special status or protection under the collective agreement and assurances were given that there was no such protection. With respect, that is a different question from the one before the Board as to whether the complainant's status and activities as health and safety representative played *any* part in the decision to lay-off the complainant rather than another employee. In short, the Board is *not* satisfied with the reasons proffered by the company for selecting the complainant for lay-off and accordingly finds a breach of Section 24(1) of the OHSA.

With respect to relief, the Board directs the reinstatement of the complainant as at the date of the lay-off with compensation for lost wages and benefits flowing from the decision of the company to lay-off the complainant on January 9, 1991. The Board is cognizant of the fact that further lay-offs followed the January 9 date. At this point, the Board considers it sufficient to direct

the parties to try and resolve the issue of compensation. If the parties cannot resolve that matter, the Board remains seized to deal with that issue and any other issues arising out of this decision.

The Board must briefly return to the "steward" issue. The Board does not regard it as necessary to conclusively determine at this juncture issues such as the date on which the complainant was appointed steward, the question of the interpretation of the collective agreement, the precise date on which the letter dated December 21, 1990 was mailed by the union or received by the company and whether the company had actual notice of the appointment of the complainant as steward prior to that date. It appears not in dispute that stewards are protected under the collective agreement from lay-off. Given that the Board has found a violation of the OHSA in the complainant's lay-off on January 9, 1991 and has directed his reinstatement as at that date, the Board considers that the parties should be able to resolve the compensation issue, but, if not, the Board may have to formally deal with those matters.

By way of relief, there has also been a request for a posting. Given the current situation at the job site with respect to the level of activity and the fact that the project will be "mothballed" for quite some time, the Board does not consider it appropriate to direct a posting. These comments, however, are made without the complainant's counsel's submissions on that point. The Board would afford complainant's counsel opportunity to address that issue. However, the Board thought it expeditious to give its thinking on the issue at this point. [Mr. McKee, counsel for the complainant, indicated that the request for a posting as part of the relief was withdrawn.]

For the foregoing reasons then, the Board finds a violation of Section 24(1) of the *Occupational Health and Safety Act* and directs the relief as noted.

1498-90-R; 1603-90-U Labourers International Union of North America, Local 837, Applicant v. **Peter Kiewit Sons Co. Ltd.**, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 38, Intervener; United Brotherhood of Carpenters and Joiners of America, Local 38, Complainant v. Peter Kiewit Sons Co. Ltd., Labourers International Union of North America, Local 837 Ontario Provincial District Council, Labourers International Union of North America, Respondents

Bargaining Rights - Certification - Jurisdictional Dispute - Unfair Labour Practice - Carpenters unable to conclude first collective agreement and subsequently commencing strike - Employer making collective agreement with Labourers and hiring all employees through Labourers hiring hall - Labourers applying for certification to displace Carpenters' bargaining rights - Carpenters alleging that employer and Labourers conspiring to undermine Carpenters' bargaining rights - Board concluding that Carpenters really complaining about work assignment and that matter should be dealt with by way of jurisdictional dispute machinery provided by Act - Board also rejecting Carpenters' assertion that persons employed on application date were "labourers" and not "carpenters" - Registrar directed to arrange for ballots to be counted - Unfair labour practice complaint dismissed

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *J. Lear* and *C. A. Ballentine*.

APPEARANCES: *S. B. D. Wahl* and *N. Schibetta* for Labourers 837; *D. J. Shields*, *Alex Drummond* and *Lee Shouldice* for Peter Kiewit Sons Co. Ltd.; *David McKee* and *Barry Walker* for Carpenters Local 38.

DECISION OF THE BOARD; July 19, 1991

1. The present proceedings involve two matters before the Board, one a section 89 complaint by the United Brotherhood of Carpenters and Joiners of America, Local 38 ("Carpenters") alleging, in effect, that the respondent Peter Kiewit Sons Company of Canada Ltd. ("Kiewit") and the Labourers International Union of North America, Local 837 ("Labourers") have conspired together to undermine the Carpenters' bargaining rights, and the other an application for certification brought by the Labourers' to displace those bargaining rights. In that certification application a Pre-hearing Vote has already been conducted, and the ballot box sealed. The allegations raised by the Carpenters' in the section 89 complaint also form the basis for an intervention filed by the Carpenters' in the application for certification, and the parties have now argued a motion brought before the Board by the Labourers', supported by the employer, that in neither case do the facts and material relied upon by the Carpenters' constitute a *prima facie* case.

2. The Carpenters' have, for the purpose of the Board's consideration of the present motion, combined all of their relevant pleadings into the following Statement of facts upon which they rely (the reference to "Tabs" from the Carpenters' accompanying Book of Documents is deleted, and the underlining is the Board's):

STATEMENT OF FACTS

1. In Board file 2974-87-R, an Application for Certification dated February 3, 1988, the Labourers' International Union of North America, Ontario Provincial District Council ("the Labourers Union") made an Application for Certification for construction labourers pursuant to section 144 of the *Labour Relations Act*. The application also contained the request "for the purposes of clarity, the bargaining unit description above includes construction labourers, form builders, form setters and cement finishers".
2. Applications for Certification by Intervener were filed by the United Brotherhood of Carpenters and Joiners of America, Local 38 ("the Carpenters Union") and by the International Union of Operating Engineers, Local 793.
3. Kiewit filed a reply to the Application for Certification disputing the appropriateness of the Applicant's claim for inclusion of form builders and form setters in the bargaining unit.
4. The Board heard a preliminary issue with respect to the constitutional jurisdiction of the Board. The Board found that it had jurisdiction.

5. The Board then dealt with the issue of the appropriate bargaining unit. It stated:

Notwithstanding the fact that the applied for bargaining units are described in terms of different classifications or trades, there is a considerable degree of overlap between the two applications. The Labourers' Union claims that a number of individuals classified by the Respondent as "form setters" are in fact, construction labourers and thus come within its applied-for bargaining unit. *The Carpenters Union however contends that these same individuals are carpenters and accordingly come within the bargaining unit it seeks to represent.*

6. In the course of the application Kiewit filed schedules of employees. These employees were described either as labourers or form setters.
7. The work performed by the persons described as "form setters" included the building, rigging and fixing in place of forms to receive concrete, *the construction of wooden steps, railings and platforms, walkways and scaffolds.*

8. The issue was ultimately resolved by Minutes of Settlement executed by the parties. *All Parties agreed that the persons described as form setters were in fact carpenters and properly included in a unit of carpenters and carpenters' apprentices.* The persons described as labourers were agreed to be labourers and properly included in a unit of construction labourers.
9. The Board issued a decision and certificates on the basis of this agreement.
10. By the date of the issuance of the certificates, Kiewit was not actively engaged in construction in Board Area 5.
11. In 1989 Kiewit bid on and secured a contract for the rehabilitation of another section of the Welland Canal. This project was essentially identical to the project undertaken in 1987-1988 during which the Application for Certification was filed.
12. Both of these projects were essentially formwork contracts. Portions of the Canal wall, the locks, and to a limited extent, the floor of the Canal, were blasted away, new re-bar driven into the side of the remaining concrete wall, concrete forms built, and concrete poured into them to replace that portion blasted away. Incidental to the formwork, was the construction of wooden steps, stairways, walkways, and scaffolds.
13. The Labourers' Union and Kiewit commenced negotiations for a collective agreement.
14. The facts with respect to bargaining between Kiewit and the Carpenters' Union are as follows:
 - (a) Negotiations for a collective agreement between the Carpenters' Union and Kiewit commenced on November 8, 1989 by a telephone call between Mr. Arthur Varty, Business Representative of the Carpenters Union, and Mr. Alex Drummond of Peter Kiewit.
 - (b) By letter dated November 8, 1989, Mr. Varty sent Mr. Drummond proposals of the Carpenters' Union.
 - (c) On November 10, 1989, Mr. Varty contacted Mr. Drummond for his response to the proposals and, if necessary, to set up a meeting for further discussions. Mr. Drummond replied that Peter Kiewit was "going with the labourers" and would be hiring "form setters" from the Labourers' Union rather than carpenters from the Carpenters' Union. He further stated that he saw no need or purpose for further negotiations with the Carpenters' Union.
 - (d) Mr. Varty asked Mr. Drummond if the wage rate he had proposed was the basis of the objection to negotiations with the Carpenters' Union. Mr. Drummond replied that it was not, but he refused to identify any other bargaining issue.
15. On November 14, 1989, the Labourers' Union signed a collective agreement with Kiewit ("the Collective Agreement").
16. The Collective Agreement does not contain a specific work jurisdiction provision. It does however contain the following:
 - 1.01 It is the intent and purpose of this Agreement to assure sound and mutually beneficial relationships between the parties hereto, to provide an orderly and peaceful means of resolving any misunderstanding or grievance without any work stoppage and to set forth herein the basis and full agreement between the parties covering rates of pay, wages, hours of work and other conditions of employment for all construction labourers employed on the St. Lawrence Seaway Authority projects, road building, parking lot con-

struction, paving, sewer and watermain construction, tunnel work and heavy construction, including all work associated with concrete forming construction and other woodworking.

- 3.07 It is agreed and understood that work covered by this agreement shall be sublet only to those subcontractors who employ members of the Labourers' International Union of North America to perform such work.
- 14.01 When a work claim dispute arises between the Union which is the second party to this Agreement and any other union or organization which cannot be settled to the satisfaction of all parties concerned, work shall proceed without stoppage. The Union which is the party to this agreement shall forthwith file a complaint with the Ontario Labour Relations Board seeking a determination from the Board under section 91 of the Labour Relations Act. Pending the final resolution of the complaint by the Ontario Labour Relations Board, the Employer shall continue with the assignment of the work made prior to the dispute arising.
17. The Collective Agreement also contains the following classifications:

Labourers, including Helpers for Form Builders and Form Setters, Form Strippers (all types) including the complete stripping of materials to be reused (wood or otherwise).

Scaffold Erectors (all types) and Dismantlers.

Form Setters, Form Builders including but not limited to all types of Forms and Skilled labourers engaged in all types of woodwork and the construction of hoarding.
18. Counsel for the Carpenters' Union contacted counsel for Kiewit who agreed to commence negotiations on behalf of Kiewit. Correspondence between the two counsels is set out at Tabs 13 through 16.
19. Certain persons were refused employment by Kiewit in November and December 1989 on the grounds that they continued to be members of the Carpenters' Union (see Complaint 3059-84-U, para. 20 & 21).
20. When Peter Kiewit commenced its work in 1989, it hired all employees through the hiring hall of the Labourers' Union. Except for supervision staff it brought in no employees from outside the area.
21. On December 8, 1989 representatives of the Carpenters' Union and of Kiewit, met and commenced negotiations for a collective agreement.
22. By letter dated December 13, 1989, counsel for the Carpenters' Union indicated the areas of agreement reached at that time.
23. The areas of disagreement were:
 - 2.02 - union membership
 - 6 - hours of work and overtime
 - 7 & 16 - travelling allowance
 - 9.02 - foreman premiums
 - 11.01 - jurisdictional disputes
 - 15 - health, welfare and pension

17 - stewards and business representatives

18 - pre-job mark-ups

19 - work jurisdiction

Schedule A - wages

The respective positions of the two parties are set out in the draft structure of a collective agreement.

24. The positions of the parties were clarified by correspondence between counsel.
25. Pursuant to a "no-board" report issued January 19, 1990, on February 5, 1990, the Carpenters' Union set up a lawful picket line. Members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and of the International Union of Operating Engineers refused to cross the picket line. Such persons were ordered by the Labour Relations Board to cross the picket line.
26. On November 20, 1989, the Carpenters' Union filed a complaint under section 89 of the *Act* alleging violations of sections 3, 60, 66(a), 67 and 70. The Labourers' Union and Kiewit replied taking the position that this was a work jurisdiction rather than an unfair labour practice complaint.
27. The hearing into that complaint was adjourned *sine die* upon discovery that one of the proper parties to that complaint was missing. The parties agreed to bring the matter back on as a combined section 89 and section 91, which are the instant proceedings.

It is agreed that all of the documents referred to in the Carpenters' pleadings are before the Board for the purpose of this motion as well, and the Board has reviewed them in the course of arriving at its decision. Of particular note is the correspondence between counsel for Kiewit and counsel for the Carpenters on the matter of Kiewit's previously-announced decision to "go with the Labourers" in the new contract assigned to it for the Welland Canal. The material exchange began with a letter from Mr. McKee to Mr. Shields which is dated December 13, 1989 and which reads as follows:

December 13, 1989

Further to our meeting Friday December 8, 1989, I enclose herewith a copy of the draft document on which we were working. I have indicated those articles agreed upon and those where we have differing proposals.

As I advised you on Friday, the monetary proposals mirror the current ICI rates. In the 1988-1989 construction season it was our experience that all employers paid the ICI rates, be they employers bound to agreements with both Carpenters and Labourers Unions or just to the Labourers Union. Your position, obviously is that conditions are different this year and that your client is unwilling to pay these wage rates.

The Carpenters Union is of course prepared to look seriously at any monetary proposal; we recognize that this is a different year and are cognizant of the wage rates set out in your other collective agreement. However, in order to take a proposed collective agreement for ratification to the membership of Local 38 (and this agreement must be ratified) which contains significantly lower wage rates we must be able to advise the membership of what value the Agreement has for them.

As you know, it is our position that Mr. Drummond of Kiewit advised Mr. Varty of Local 38 that he saw no point in bargaining as Peter Kiewit and Sons did not plan to hire members of Local 38 but that the Company was "going" with formsetters from the Labourers Union to work

on the canal. You have denied such a statement was made, but you did state in your letter of November 20, 1989 that

Mr. Varty inquired of representatives of the Company as to whether or not there would be carpenters' work on the St. Lawrence Seaway Project. Mr. Varty was informed there would not be any such work.

Given that this was basically a formwork project, the difference between the two versions of Mr. Drummond's statement is minimal.

Accordingly, we need to have answers to the two questions I put to you on Friday, and which your client declined to answer, namely:

1. If a satisfactory collective agreement is concluded, does Peter Kiewit & Sons Co. Ltd. plan to hire any carpenters who are members of Local 38 pursuant to that collective agreement?
2. If so, what work do you propose to assign to them?

We require answers to those two questions immediately.

One final matter requires comment. You referred to our proposed Article 19 ["Work Jurisdiction"] as a "demand for work". While we may in the end make such a demand, this proposal is simply that - a proposal for inclusion in a collective agreement. Until you answer the two questions put to you above, we really do not know our position.

I confirm I have arranged with Mr. Landon to meet January 12, 1990 at 400 University Avenue at 10:00 o'clock a.m.

Mr. Shields responded as follows:

January 10, 1990

I have now had an opportunity to obtain instructions from my client regarding the two questions raised in your correspondence dated December 13, 1989.

Although it is difficult to anticipate what work will be available when a collective agreement is reached by our clients, please be advised that, when a collective agreement is concluded, Peter Kiewit Sons Co. Ltd. will assign work to members of Local 38 pursuant to the collective agreement to perform any work that is properly within the jurisdiction of the Union and which has not already been properly assigned to the Labourers' Union pursuant to the Company's collective agreement with that trade union. I trust that you will appreciate that it is impossible to provide a more precise response to your question at this time based on the state of the negotiations between the parties. However, as you are aware, the Company is currently engaged in a construction project on the Welland Canal involving concrete formwork, which formwork has been assigned to members of the Labourers' Union pursuant to the Company's collective agreement with that Union. At the present time, the Company does not anticipate making any change in that work assignment.

I will provide you with a schedule dealing with the Company's response to your material relating to the current state of bargaining between the parties under separate cover.

Mr. McKee further wrote:

January 12, 1990

Further to your letter of January 10, 1990 and our meeting of January 12, 1990, I am writing to confirm the Employer's position in this matter. You have advised as follows:

1. Peter Kiewit Sons Co. Ltd. proposal in response to our proposed Article 19 is that no

work jurisdiction clause be included in the agreement at any point, but that otherwise the structure of the collective agreement (apart from its contents) is acceptable.

2. Your letter of January 10, 1990 means essentially that the employer believes that it has "properly assigned" all the work it proposes to do on this project to members of Labourers Local 837 and that it has no intention of hiring any members of Carpenters Local 38.
3. If the Union were to accept all the proposals on the remaining outstanding issues in the collective agreement, and sign the collective agreement, the employer would not hire a single member of Local 38 to perform any work on the current project in the canal.
4. You agreed that, while you could not make definite commitments with respect to future projects, it is a reasonable assumption that, with or without a collective agreement, no member of Local 38 will be hired for any future similar project.

I will assume the above fairly reflects the Employer's position unless you advise otherwise. Thank you.

To which Mr. Shields responded:

January 23, 1990

This letter is in response to your letter to me of January 12, 1990. I respond to the points raised in your letter seriatim:

1. The Company proposes that no specific work jurisdiction clause should be included in the collective agreement. I confirm that the contents of the enclosure provided to me with your letter of December 13, 1989 accurately sets out the position of the parties.
2. This statement accurately describes the position of the Company on the Welland Canal Project. The Company is unable to determine whether or not work will be assigned to members of the Carpenters' Union, Local 38, on any future project.
3. In response to this paragraph, the Company states that it has properly assigned all work on the Welland Canal Project. On this basis, the Company takes the position that there is no work on the Canal properly assignable to members of the Carpenters' Union. As such, and on this basis, no work would be assigned to members of the Carpenters' Union as such work has already been properly assigned.
4. As you indicate, the Company cannot make commitments with respect to future projects. As such, the Company is unable to determine whether or not members of the Carpenters' Union will be hired for any future project within the geographic scope of any collective agreement between the parties. However, as you are aware, the Company has assigned form work on the Welland Canal Project to members of the Labourers' Union pursuant to the Company's collective agreement with that Trade Union. It is anticipated that, all things being equal, the Company will make similar assignments on similar projects in that area in the future.

Furthermore, I note that the parties remain significantly apart, both on the question of monetary issues and on the issue of jurisdiction. On this basis, the position of the Company with respect to issues number 3 and 4 are, to a very large degree, somewhat speculative.

The respondent Kiewit argues that what it is the Carpenters are complaining about is simply a decision made by it to assign particular work in a certain way, and more specifically, the assignment of that work to the Labourers' rather than the Carpenters'. The Labourers' concur, and add that all that they were doing at the bargaining table was attempting pursuant to their own self-interest to negotiate language into the "Classifications" section of their collective agreement that would

enhance their jurisdictional claim to certain work. Both parties argue that the Board has consistently held that these are matters to be dealt with by way of the jurisdictional-dispute machinery provided by the Act, and not by way of an “unfair labour practice” complaint.

3. We agree. The case of *Ontario Hydro*, [1985] OLRB Rep. Feb. 307, in particular, we note raises a number of parallels with the instant complaint. The complaint that was before the Board in that prior case is set out in the Board’s decision as follows:

1. The complainant has complained that all employees in the bargaining unit represented by the complainant at Pickering Generation Station (the “station”) and all employees in the complainant’s bargaining unit who have been declared surplus by Ontario Hydro have been dealt with contrary to the provisions of sections 48, 49, 64, 66, 67 and 70 of the *Labour Relations Act* and has requested certain relief. The complaint arises in connection with the work of retubing nuclear reactor units at the station and other work respecting the nuclear plant at that station. It is the position of the complainant that on or about October 2, 1984, Ontario Hydro informed the chief stewards of the complainant that effective October 4, 1984, the work referred to earlier would be performed at the station under the terms and conditions of Maintenance Assist Agreements between the Electrical Power Systems Construction Association (“EPSCA”) of which Ontario Hydro is the dominant member and several construction trade unions.

2. It is the position of the complainant that prior to October 4, 1984, all maintenance work on nuclear generating units had been performed by members of the complainant in accordance with the terms and conditions of the collective agreement between the complainant and Ontario Hydro. The complainant alleges that at all material times it had sixty-seven surplus employees, all of whom were capable of performing some of the work involved in the retubing of nuclear reactors at the station and other maintenance work respecting the nuclear plant.

The Board went on to dispose of the matter in the following terms:

7. The Board has considered the complaint, the exhibits filed in evidence by the parties and the opening statement by counsel for the complainant. It appears to the Board that the agreements which are referred to as collective agreements and to which the respondent trade unions are parties are neither intended to be binding on members of the complainant nor are the respondent trade unions attempting to represent employees in the bargaining unit represented by the complainant. In our opinion the complainant and the respondent trade unions are confronting each other over a perceived overlap in work jurisdiction and not with respect to bargaining rights. The Board has previously considered complaints under what is now section 89 of the Act with respect to section 67 (formerly section 59). In *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, the Board stated at page 1034:

Nor can it be said that the subcontracting clause interferes with another union’s bargaining rights contrary to sections 56 [now section 64] and 59 [now section 67] of the Act. In the Board’s view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under the *Labour Relations Act*, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a sub-contracting provision. Sections 57 [now section 64] and 59 [now section 67] of the Act are intended to protect bargaining rights only and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 81 [now section 91] of the Act for the resolution of jurisdictional disputes.

The Board dismissed the complaints with respect to the sections referred to in the quotation and several other sections of the Act.

8. In *Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451, the Board also considered whether work jurisdiction and bargaining rights are synonymous and the relative place of jurisdictional disputes and stated at page 456:

While the Board recognizes that bargaining units are often defined in terms of certain job classifications or work categories, these descriptions do not mean that the bargaining agent has an absolute right to the work being performed by the group of employees falling within such job classifications. The reference to work categories in the bargaining unit descriptions, although serving to identify the employees falling within the bargaining unit, does not by itself create an unqualified entitlement to that work. The fact is that some other bargaining agent may also have bargaining rights for other employees of that same employer that are defined in terms of different work categories, and some of the work performed by the employees falling within these work categories may overlap to some degree that of the other group of employees. Job categories are not watertight and, in fact, there may be considerable leakage between categories, giving rise to competing claims for work from bargaining agents. This sort of problem, as a general rule, is not treated as one involving representation rights of the competing bargaining agents but as a dispute over work jurisdiction. The Act contemplates that such competing claims to work are to be resolved through the jurisdictional dispute procedures set out in section 81 [now section 91].

and again at page 457:

The Board is convinced that this complaint is nothing more than a latent jurisdictional dispute. It is clear to us that the complainant, by framing its argument in terms of a derogation of bargaining rights, is attempting to assert an absolute claim to the work in question. If the Board were to grant the remedy requested by the complainant, it would have the effect of preventing the respondent union from making any claim to the work in question. Even if Local 35-P has the better claim to the work in question, and we make no finding in this regard, such a claim should be asserted through the jurisdictional dispute provisions under section 81 of the Act, and not by means of an unfair labour practice complaint.

The Board dismissed the complaint under section 79 [now section 89] with respect to offences alleged under, *inter alia*, sections 56 [now section 64] and 59 [now 67].

That line of cases was recently considered and affirmed by the Board in *International Union of Operating Engineers, Local 793*, an unreported decision in Board Files 3097-89-U and 3163-89-U, issued November 8, 1990 [now reported at [1991] OLRB Rep. Feb. 199], and raised with the present parties at the hearing.

4. The Carpenters' acknowledge that line of cases, but argue that the difference here is one of degree. More particularly, they go on, the present case involves work that this very employer on the preceding project assigned to a composite crew of labourers and carpenters, and now the employer is saying that it has made a decision not to assign work of that nature to the Carpenters' Union *at all*. In the Board's view, however, that distinction is not a material one. The manner in which the Board handles a complaint like the one before it ought not to depend on whether the employer may have reserved some nominal amount of work for the complaining Union. Nor would that argument appear helpful in distinguishing, for example, the *Ontario Hydro* decision, just referred to, if one analyses the Board's decision from the point of view of the broad category of "work in dispute". The key point as the Board continues to see it is that at root in the complaint is the employer's assignment of work, and if the employer has indeed changed its own practice with respect to the manner in which it chooses to get certain work done, that obviously is a factor that the dispossessed Union is able to rely upon in any jurisdictional claim to be determined

by the Board. But beyond that, an employer “preference” of one union over another is exactly what jurisdictional-dispute proceedings tend to be all about, and there is nothing unusual in an employer putting forward considerations of economy, efficiency, or any other grounds of such nature, for however far such factors on a given set of facts may ultimately take the employer. Similarly, the Board has never suggested that a trade union commits an unfair labour practice by seeking the inclusion of terms in its *own* collective agreement designed to enhance its position from a “jurisdictional” point of view, and that is hardly something new to the construction industry, as the Carpenters’ well know. Indeed, this Board has yet to decide on a current basis what weight it would be inclined to give such “boot-strapping” in any subsequent jurisdictional dispute with an entity not a party to the agreement, in the face of other pre-existing factors, and it is not obvious therefore that the effect of such a mode of conduct on the competing trade union’s claim to any work would rank beyond the range of minimal to zero.

5. On the other hand, positions taken by an employer in the bargaining between itself and the *complaining* Union may well be considered by the Board to fall within its scope of review under section 15 of the Act, which enshrines the duty to bargain in good faith. Certainly the Board would have concern over the refusal of an employer in Kiewit’s position to bargain towards a collective agreement at all - for example, on the grounds that it at the time employed no employees which fell within the scope of the union’s bargaining rights, and did not foresee a change in that. But on the pleaded facts and documents, that is not, at least by the time counsel were involved, what happened here, and the Carpenters’ Union brought no complaint under section 15 of the Act alleging that it did. Beyond that stark example, however, the Board as a practical matter has also recognized, particularly in dealing with “craft” unions, the area of overlap between work jurisdiction and the future of a union’s bargaining unit, and the Board has responded to its role under section 15 of the Act to prevent an employer from pressing to impasse a demand which would be tantamount to asking a union to “shoot itself in the foot” with respect to its chances subsequently of being able to successfully mount or defend any jurisdictional claim to the work.

6. That is what the “second” *Toronto Star Newspapers Limited* case, relied upon by the Carpenters’ and reported at [1979] OLRB Rep. August 811, decides - and that is all that that case decides. In that case, the Board had already dismissed a previous “unfair labour practice” complaint on the grounds quoted above. Referring to that earlier decision the Board noted:

5. In dismissing the earlier complaint the Board characterized it as a “latent jurisdictional dispute.” While recognizing that the Star’s proposal might eliminate the demarcation line between the two unions and result in a different work assignment under the new collective agreement, the Board refused to equate the potential reassignment of work with a diminution of the union’s bargaining rights or recognition and stated that the claim for the work in question “should be asserted through the jurisdictional dispute provisions under section 81 of the Act and not by means of an unfair labour practice complaint.”...

About the second complaint the Board then stated:

14. Turning to the merits. Other than in respect of the reference to 1 Yonge Street in the Star’s proposal this panel has no reason to characterize the complaint before it any differently than did the panel which disposed of the earlier complaint. This panel, as with the previous panel, is of the view that the bargaining unit description defines the complainant’s bargaining rights in terms of those employees of the Star who perform certain work as members of the photoengravers’ craft. The complainant has the exclusive right to represent all those who do the work as members of the craft. For the reasons found at paragraphs 11 and 12 of the Board’s earlier decision, however, the complainant photoengravers do not have an absolute claim to the work nor is the work description frozen for all time absent their agreement to alter it. Whereas the previous panel was faced with an attempt by the Star to bargain for a discretion to assign the work, this panel is faced with an attempt by the Star to negotiate an immediate change to the work description. Although it is now possible to determine how many members of the photoengravers may

lose their jobs as a result of the proposed amendment to the work description, the result is not to transform this into a recognition matter.

15. A union holding the bargaining rights for a craft unit of employees, as distinguished from an all employee unit, represents only the employees working within that craft. Regardless of whether the work of the craft is expressly set out in the collective agreement, the bargaining rights of the union representing a craft unit of employees are circumscribed by its established work jurisdiction. Consequently, any alteration in work assignment affects the scope of its representation rights. It follows that the Board is given the authority under section 81, the section of the Act dealing with work jurisdiction disputes, to alter the bargaining unit determined in a Board certificate or defined in a collective agreement as it considers proper for there is an inherent recognition element to many work jurisdiction disputes. This is not to say, however, that there is an equation between work jurisdiction and recognition even where members of one union lose their jobs as a result of a change in a work assignment. If the matter involves an assignment of work between competing unions and not an attempt to deal with other than the bargaining agent recognized for the employees in the craft unit, then it is essentially a work jurisdiction dispute and must be treated as such.

And then, of particular significance to the argument advanced in the present case:

16. The complainant photoengravers rely on the possible loss of 4 jobs and argue that if the matter is not one of recognition and if they are not permitted to rely on section 59 [now 67] of the Act and the other sections of the Act which maintain a trade union's exclusive bargaining rights, *another union or the employer could wipe out the existence of a craft unit under the guise of a change in work assignment*. The position of the photoengravers ignores the existence of section 81 of the Act. The employer cannot unilaterally wipe out the existence of a craft by reassigning the work of the craft, and neither can the other trade union by requiring the work to be reassigned. These actions can found a section 81 complaint and a full hearing on the merits. If in the end result there is a loss of jobs they will have been lost as a result of a work assignment supported on its merits and not as a result of disregarding the bargaining rights of one of the trade unions.

[emphasis added]

With respect to the complaint against the competing union, over changes it had managed to achieve to its collective agreement, the Board further ruled:

26. Without passing comment on the merits of the stereotypers' claim to the work in question, we are satisfied that the stereotypers did not violate the Act in seeking and achieving tentative agreement with the Star in respect of its claim to this work. The Board does not view the prior agreements as necessarily settling the competing claims for all time as is suggested by the photoengravers. The Board has found that the issue before it is not one which can be primarily characterized as recognition and accordingly, the Board hereby dismisses the complaint against the Printing and Graphic Communications Union No. N-1. The agreement between the Star and the stereotypers in respect of this work does not compromise the photoengravers' claim to the work under section 81 within the meaning of paragraph 16 of the Board's earlier decision. The tentative agreement stands and if ratified a collective agreement will exist with work jurisdiction which overlaps with that found in the photoengravers' agreement. Section 81 of the Act is designed to deal with such conflicting work jurisdictions and the Board has broad powers to direct what action shall be taken including the power to alter bargaining unit descriptions.

7. On the section 15 aspect of the complaint, however, the Board in this second decision noted as well from the earlier decision:

5.

In dismissing the complaint on the basis set out above the Board was careful to point out in the final paragraph of its decision that its conclusion did not mean that the Star and the stereotypers could use the negotiation process to weaken the photoengravers' claim to the work in question. The Board stated unequivocally at paragraph 16 that:

“Local 35-P (photoengravers) is entitled under section 81 of the Act to have its claim to the work in question dealt with on its merits. Accordingly, any attempt to circumvent the jurisdictional dispute procedures of the Act by either the Star or Local 1 in their bargaining would be inconsistent with the Act and would amount to a breach of the duty to bargain in good faith.”

Focusing then on the bargaining between the employer and the *complainant* Union, the Board went on to conclude as follows:

18. The fact situation before this Board is substantially different than that upon which the Board dismissed the earlier section 14 [now 15] complaint. Since the issuance of the Board's earlier decision the Star has amended its position so that it no longer seeks a discretion in respect of work assignment but rather is attempting to alter the work description in the collective agreement. All other matters have been tentatively settled so that work jurisdiction remains as the only matter in dispute and the Minister has issued a “no board” report so that the parties are currently in a legal strike/lockout position. In addition the Star has negotiated a tentative settlement with the stereotypers which includes a work description which overlaps with that found in the expired photoengravers' collective agreement. It is against these critical facts that this panel must decide if either or both of the respondents have violated section 14 of the Act.

19. Both respondents rely in large measure on the legality of the work assignment agreements previously negotiated by the parties and argue that if such agreements are legal within the framework of the Act it cannot be illegal to bargain for them. This argument is sound in so far as it goes. The respondents, however, ignore the fact that the negotiations between the Star and the photoengravers have reached an impasse over this very issue and that a strike or lockout is now imminent. Clearly there is nothing unlawful about attempting to work out an agreement between interested parties and indeed, such agreements are contemplated under the Act and the parties are to be encouraged in this regard. In this round, however, in contrast to the last round of negotiations, the Star and the photoengravers have not been able to reach a voluntary agreement. It is clear that if the work description is to be altered it will be as a result of economic leverage. The Board must assess the bargaining between the parties in light of this fact and in light of the provisions of section 81 of the Act.

• • •

22. In view of the express provisions in section 81, respecting the resolution of jurisdictional disputes, are the parties free to resort to economic conflict to settle these matters, and can a party be bargaining in good faith if it presses the issue to an impasse and precipitates a strike? The answer must be no. It is inconceivable that the Act would contemplate resort to strike or lockout in support of a work assignment objective which could properly be made the subject matter of a section 81 complaint upon the actual assignment of the work. If such were the case the strike/lockout would be a tenuous and perhaps fruitless exercise in that the Board, on any subsequent application under the section, would be required to assess the merits and could decide the matter independently of the results achieved by use of what might have been a prolonged and costly economic struggle. The work assignment agreement thus achieved, in contrast to the other terms of settlement, would be subject to review and possible alteration by the Board. Under the section the Board may make its determination notwithstanding the work assignment provisions of any collective agreement and, in appropriate circumstances, can even “rewrite” those provisions. In a general sense then it can be seen that bargaining issues relating to work jurisdiction which could be made the subject of a section 81 application do not easily fit within the process of free collective bargaining and enforceability as established under the Act. More specifically, the broad interim powers given the Board under section 81(8) to deal with work jurisdiction complaints where a strike is imminent underscores the qualitative difference between work jurisdiction and the usual subject matters giving rise to strike or lockout. If a strike is imminent because of a bargaining demand for a work assignment involving work being done by another union it can be met with a section 81(8) complaint and in response the Board may issue an interim order which removes the work jurisdiction issue from the realm of bipartite economic struggle and paves the way for a hearing on the merits involving all interested parties. On its face then section 81 qualifies the union's right to strike and prevents the development of a

situation in which the assignment of work will be determined by the relative economic strength of either of the competing unions or the employer.

• • •

24. In this case it is the Star which is attempting to force acceptance of an arrangement other than the status quo as embodied in the previous collective agreement and in so doing *is requiring the photoengravers to possibly prejudice their position in any subsequent section 81 proceedings*. Indeed, the Star maintains in its representations that if an agreement is achieved through the use of free collective bargaining a potential jurisdictional dispute will be effectively disposed of. In its earlier decision the Board stated that neither the Star nor Local 1 (stereotypers) could use the negotiation process to weaken the photoengravers' claim to the work in question. The Star, however, has ignored the caution contained in the Board's earlier decision and has misused the bargaining process by pursuing its demand to a bargaining impasse. The photoengravers have refused to voluntarily alter the existing agreement and accordingly, the Board hereby finds, in the face of a bargaining impasse, that the refusal of the Star to withdraw its demand without prejudice to whatever position it might take in any subsequent section 81 complaint, constitutes a violation of the duty contained in section 14 [now section 15] of the Act.

• • •

[emphasis added]

8. In the present case, once again, there has been *no* complaint of bad-faith bargaining brought before the Board under section 15 of the Act. Perhaps even more to the point, given that the Carpenters' were in a "first-contract" situation, there was no application filed under section 40a of the Act either. Instead, as the respondents fairly observe, the Carpenters' Union chose to "take the matter to the street", and test the ability of the employer to function without its members by calling a "strike" (it of course *had* no members employed by Kiewit at the time). Counsel advised the Board that when this whole matter was before another panel under a different complaint on September 6, 1990, the Vice-Chair of that panel, upon hearing the Carpenters' lament, in fact inquired of the Carpenters' whether any application had been filed with the Board under section 40a. If that question caused the Carpenters' to re-assess their position in any way, they moved too late: the next day the Labourers' filed their application for certification, seeking to displace the Carpenters' union as bargaining agent in the latter's unit of "all carpenters and carpenters' apprentices" employed by this employer.

9. And that brings us to the second branch of the Labourers' motion. The Carpenters' by way of intervention in the application for certification submit essentially, as in the section 89 complaint, that Kiewit and the Labourers' have conspired to place the Carpenters' in the position they now find themselves. In particular, with respect to the attempt by the Labourers' to now take over the bargaining rights for "carpenters and carpenters' apprentices" of the employer Kiewit, the Carpenters take the position that the persons at work on the date of the application were "labourers" already covered by the Labourers' collective agreement, and not "carpenters" at all. In that regard the parties have placed before the Board the following "Agreed Statement of Facts":

AGREED STATEMENT OF FACTS

1. Peter Kiewit Sons Co. Ltd. ("Kiewit") is a company engaged in heavy engineering sector construction work in the Province of Ontario.
2. In August, 1990, Kiewit began work on a dock to serve the "Maid of the Mist" ferry in Niagara Falls. The entire scope of the project consisted of the building of various temporary wood structure access ways (stairs and walkways), a temporary wooden dock and the permanent reinforced concrete dock consisting of panel formwork, setting of reinforcing steel and the pouring, placing and finishing of concrete. Work com-

menced from on and after August 23, 1990 with the construction of the wood structure access ways (stairs and walkways) and temporary wooden dock.

3. Kiewit site superintendent John Neal assembled a crew to commence work on the temporary wooden access ways and temporary dock. The procedure adopted was that John Neal contacted employees directly and offered to hire them to perform work required on the project. Certain individuals who presented themselves for work at the project also received offers of employment. From the commencement of the project to and including the date of application, September 7, 1990, employees were engaged in the construction of the temporary wood structure access way from the base of the elevator shaft to the temporary dock cove, approximately 200 ft. long and 10 ft. wide inclusive of wooden stairways, landings and handrails. This walkway is designed to hold 600 people at a time. Without limiting the generality of the foregoing, the following list of employees were present at work on the day of application, September 7, 1990, and performed the listed work on that date:

<u>Name</u>	<u>Date of Commencement</u>	<u>Work Performed on Application Date September 7, 1990</u>	<u>Date of Termination</u>
James Coffin	Aug. 23/90	Working foreman walkway construction supervision, hoe ram concrete demolition	Dec. 22/90
Michael Popovich	Aug. 23/90	hoe ram concrete demolition	Dec. 22/90
Fran McKey	Aug. 27/90	working in mill yard at mitre saw bench	Dec. 22/90
Renzo Garofalo	Aug. 27/90	building wood stairs and landing	Jan. 2/91
Michael Camache	Aug. 27/90	building wood stairs and landing	Jan. 11/91
Wayne Hildebrand	Sept. 4/90	mill yard unload and stockpile lumber	Dec. 14/90
Walter Lato	Sept. 4/90	mill yard unload and stockpile lumber	Jan. 5/91

Popovich and McKey were hired and employed by Kiewit pursuant to the Labourers collective agreement on the 1989-90 Welland Canal job between November 29, 1989 to May 4, 1990 and December 15, 1989 to April 27, 1990 respectively.

4. Kiewit applied the provisions of the Collective Agreement to the employment of the above-listed personnel before, on and after the date of application including the payment of wages, remittance of benefits to trust funds and the direction and forwarding of union dues to Labourers, Local 837.
5. Attached hereto are engineered drawings and photographs of the Maid of the Mist Steamboat Co. Ltd., temporary walkway construction project and of the wood stairs and landing (photographs taken later).
6. After the date of application, Kiewit employed the following listed members of Lab-

ourers, Local 837 in addition to those referred to above to perform the work on the permanent concrete dock construction.

<u>Name</u>	<u>Date of Commencement</u>	<u>Date of Termination</u>
Michael Boutellier	October 15, 1990	December 22, 1990
Colin Devine	September 11, 1990	January 6, 1991
Joe Digianni	December 10, 1990	January 4, 1991
Vittorio Dorazzio	December 10, 1990	January 4, 1991
Calvin French	November 5, 1990	December 19, 1990
Tim Furey	September 13, 1990	January 5, 1991
Kerry Lambert	December 10, 1990	January 2, 1991
Serge Loisel	December 10, 1990	December 21, 1990
Terry Mitchelitis	December 10, 1990	January 5, 1991
Ronald Perry	September 23, 1990	January 6, 1991
Bill Popovich	November 5, 1990	December 22, 1991
Agostino Sposato	November 2, 1990	January 4, 1991
Brydon Terry	November 12, 1990	December 22, 1990
Joseph Yorke	September 13, 1990	December 22, 1990

These employees were hired through the Labourers, Local 837 hiring hall in response to requests for work referrals by Kiewit.

DATED at Toronto this 17th day of May, 1991.

LABOURERS INTERNATIONAL
UNION OF NORTH AMERICA,
LOCAL 837

PETER KIEWIT
SONS CO. LTD.

UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF
AMERICA, LOCAL 38

Along with those agreed facts, however, the Carpenters' reserved the right to rely as well on all of the facts pleaded by it in support of its section 89 complaint, as set out above.

10. Looking at the description of the work being performed on the date of application as set out in the Agreed Statement of Facts, the Carpenters' did not find it in their interest to take the position before the Board that, for example, Mr. McKey ("working in mill yard at mitre saw bench") or Messrs. Garofalo and Camache ("building wood stairs and landing" - for which the agreed statement also included the engineered set of drawings) were not performing traditional "carpenters'" work. Here, counsel for the Carpenters' union submits, however, when one looks at the classifications and broad references to "all types of woodwork" which Kiewit and the Labourers' have incorporated into the Labourers' collective agreement, at the acknowledgment by Kiewit in its Reply that in the present job "work was assigned by Peter Kiewit in accordance with the

terms of the company's collective agreement with the Labourers' International Union of North America", and to the fact in paragraph 4 of the Agreed Statement that:

4. Kiewit applied the provisions of the Collective Agreement to the employment of the above-listed personnel before, on and after the date of application including the payment of wages, remittance of benefits to trust funds and the direction and forwarding of union dues to Labourers, Local 837.

the Board must conclude that these are in fact individuals covered by the *Labourers'* collective agreement, and, consequently, "construction labourers", not "carpenters and carpenters' apprentices".

11. The Board, on all of the facts agreed to be placed before us, does not agree with that conclusion. As the Board stated the problem in *Runnymede Development Corporation Limited*, [1988] OLRB Rep. Sept. 976, at paragraph 11:

• • •

How does one determine whether an employee who is working in one trade or another in circumstances where the two trade jurisdictions overlap, as do those of construction labourer and carpenter? It is no easy matter to do so particularly when the work being performed comes within the overlap. However, the determination must be made and can only be made by considering the evidence as a whole and bringing to bear the Board's own expertise.

The parties have referred the Board to a number of cases to assist it in this regard: see for example, *George Asmussen Limited*, [1970] OLRB Rep. Oct. 783; *Industrial Lighting and Contracting Limited*, [1979] OLRB Rep. 985; *Semple-Gooder Roofing Ltd.*, [1983] OLRB Rep. 1908; *H & D Construction*, [1987] OLRB Rep. Dec. 1495; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254; *Shearwall Forming*, [1989] OLRB Rep. Dec. 1259; *Gisar Ltd.*, [1985], OLRB Rep. April 528 and *Bradsil Limited*, an unreported decision in Board File No. 3307-87-R released December 4, 1990. However, the case the Board has found the most apposite, in determining the narrow issue coming before it here, is another decision of the Board in *Runnymede Development Corporation Limited*, also referred to us by the parties and reported at [1987] OLRB Rep. Oct. 1305. There, the *Carpenters'* were bringing an application for certification and it was the position of the *Labourers'* that "carpenters and carpenters' apprentices" were already covered by the M.T.A.B.A. and Toronto Housing Labour Bureau collective agreements for "construction employees", as further set out in those agreements. In agreeing with the Carpenters' Union that they were not, the Board stated:

22. Except for bargaining units of or including operating engineers, it is the long-standing practice of the Board to describe bargaining units in the construction industry in terms of trades or crafts (for our purposes these terms are synonymous) rather than in terms of the work performed. This practice recognizes that trade union representation in the construction industry has traditionally been along trade lines and attempts to avoid interfering with established trade union work jurisdictions (see *Robertson-Yates Corporation Limited*, [1979] OLRB Rep. Apr. 344; *Semple-Gooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908). Unfortunately, the work jurisdictions of trades do overlap. In addition, as we have already noted, collective agreements in the construction industry often identify the employees in the bargaining unit to which they apply in terms of the work they perform. As a general rule, there is no necessary congruence between the bargaining rights held by a trade union and its work jurisdiction. Consequently, a construction industry trade union does not necessarily have a general absolute right to a particular kind of work, even though that work may be performed by employees whom it represents (which in the construction industry usually means its members) pursuant to the terms of one or more collective agreements. The fact is that, in the construction industry, more than one trade union may have bargaining

rights for employees who, though described in terms of different job categories, perform some of the same work. These overlaps give rise to competing claims for work between trade unions; that is, jurisdictional disputes (see for example *Toronto Star Newspaper Limited*, [1979] OLRB May 451). An application for certification is not the appropriate forum for settling such disputes or for determining the jurisdictional limits of trade unions (*Industrial Lighting and Contracting Limited*, [1979] OLRB Rep. Oct. 985). Further, because the Board's practice in the construction industry is to describe bargaining units in terms of trade rather than work performed, the mere fact that members of one trade union, pursuant to the terms of a collective agreement, perform work that members of another trade union perform as well (for other employers), does not mean that that collective agreement covers that other trade (see *The Frid Construction Company Limited*, [1975] OLRB Rep. March 146; *Graff Diamond Products* (Board File No. 2817-86-R) decision dated June 29, 1987, unreported).

23. Some of the work covered by the Housing Bureau Agreement is work which can be, and is, performed by either construction labourers, or by carpenters or carpenters' apprentices; that is, it is work over which both trades assert jurisdiction. In other words, some of the work covered by the Housing Bureau Agreement can be done by either members of the United Brotherhood of Carpenters and Joiners of America, (the "Carpenters") or by members of the Labourers' International Union of North America (the "Labourers"). It is both "labourers work" and "carpenters work". In such circumstances, the work being performed cannot be determinative of the trade of the person performing it; that is, it is not work belonging to the Labourers just because a labourer is doing it, nor is it work belonging to the Carpenters just because a carpenter or carpenter's apprentice is doing it. An employee is not a construction labourer merely because s/he is doing work that a construction labourer sometimes does if carpenters also perform that work as part of their trade. Consequently, the fact that members of the intervener sometimes perform work (for the respondent) that carpenters also do does not mean that the intervener represents all carpenters employed by the respondent.

The Board has recognized also and observed for example, in *Ecodyne Limited*, [1979] OLRB Rep. July 629:

28. The evidence establishes that when contractors bound by the local Thunder Bay area collective agreements worked on Hydro projects, they applied the terms of the agreements to their employees notwithstanding the fact that these employees were not included within the scope clause of the agreements. The mere fact that the terms of a collective agreement are applied to certain work and to certain employees does not, however, mean that the union party to the collective agreement has actual bargaining rights for the employees involved. See: *Bechtel Canada Limited*, Board File No. 0745-75-R, an unreported decision dated September 3, 1975. In this regard it might be noted that it is not at all uncommon in the construction industry for employers not formally bound to a collective agreement to nevertheless employ union members under the same terms and conditions as set forth in a collective agreement without any intention of thereby conferring bargaining rights on the union. Similarly, trade unions in such circumstances sometimes refrain from applying to the Board to be certified as the legal bargaining agent of the employees involved notwithstanding the fact that the employees are union members.

12. In the present case, of course, there can be no issue over whether the "Labourers'" collective agreement covered "carpenters" as well as "labourers". That would be illegal in light of the Carpenters' outstanding bargaining rights, and neither the Labourers' nor Kiewit assert that. Rather it is the Carpenters' Union who is making the assertion that the persons at work on the date of the application are covered by the Labourers' collective agreement, in order to cause the Board to characterize those persons as "labourers", and not as "carpenters", and thus to find that the number of persons employed by Kiewit in the applied-for unit was, as of the date of the application, zero. In further support of that the Carpenters' point to the fact that some of those very same individuals were employed under this same Labourers' agreement on the Canal job to perform what it says was essentially the same work as it asserts is involved in the present Maid-of-the-Mist job. The right of the employer to have done that is, of course, exactly the dispute raised by the

Carpenters' in the present set of files. What is *not* in dispute is the fact that, as the Carpenters' themselves have set out, essentially the same work was also involved in the *first* Canal job, and on that job it was ultimately agreed by all parties, at the insistence of the Carpenters', that the individuals employed by Kiewit and doing this work in the classification of "form-setter" were really "carpenters". And it was on the basis of that tripartite agreement that the Carpenters *obtained* the bargaining rights that are the subject matter of the present application. Subsequent to obtaining those bargaining rights, as the Carpenters' pleadings also tell us, the employer took the position that it felt it could accomplish its work, including work previously recognized by the parties as traditional "carpentry" work, without using members of the Carpenters' Union. As indicated above, the strategic route chosen by the Carpenters' to test that assertion by the employer was to call a "strike" and withhold its members' services. The Carpenters' Union maintained that tactical position even beyond the point where their bargaining rights were protected by the Act (see section 61(3)), and including a point at which the employer was ready to hire a crew to commence work on a new project, the Maid-of-the-Mist dock. That the employer in the result ended up using available members of the Labourers' Union to perform some of what even the Carpenters' Union finds it expedient to agree is clearly the work of their traditional craft, is not surprising in the circumstances. Nor, given the fact that such persons would have to be hired on the basis of *some* terms and conditions, is it surprising that the employer at that stage would use its existing collective agreement with the Labourers' Union as the basis for such hiring.

13. The Board does not find the case of *Bradsil*, *supra*, relied upon by the Carpenters', helpful on the facts now before it. In *Bradsil* the Carpenters' and the Labourers' were both applying for a unit of "carpenters and carpenters' apprentices". The employer had placed on the list a large number of employees whom the Carpenters' said were really "labourers". The Report of the Board's Labour Relations Officer on the testimony of these putative "carpenters" contained a number of illuminating statements such as:

"... carpenter would come and do the base and then we fill it up with cement ..."

and

"I would use a saw when I needed to or I'd go and ask the carpenters to saw the wood for me ...".

Further, the Report showed that a large part of what these individuals actually did was clearly "labourers'" work ("cleaning up, helping other trades, looking after the propane tanks and heaters" - not surprisingly, since the individuals in dispute in their testimony described themselves as "labourers" hired to perform assorted types of "labourers'" work. The Board came to the conclusion that these individuals added to the list by the employer and the Labourers' were in fact "labourers", and not part of the unit.

14. The nature of the work being performed in the present case, by contrast, is more akin in its level of skills to that disclosed in the Officer's Report in *Gisar*, *supra*, in which the Board came to the opposite conclusion. Having regard to the Carpenters' own acknowledgment that at least three of the employees at work on the date of the application here were performing work which undoubtedly would fall within the traditional craft of a "carpenter", together with what it is the Agreed Statement of Facts shows these employees were actually doing on the date of the application (a stage at which any "formwork" on the project had not even begun yet), the Board finds that at the very least there were three persons employed as "carpenters" on the date of the instant application.

15. It follows from that conclusion that there is no reason to inquire further into the matters

pleaded by the Carpenters' with respect to the certification application, since even accepting all of those pleaded statements to be true, together with the agreed upon Statement of Facts, the Board finds that the applicant would have the requisite percentage of membership support in the unit applied for to entitle it to a pre-hearing vote.

16. The Registrar is accordingly directed to arrange for the ballot box to be unsealed and the ballots counted.

17. For the same reasons given, the section 89 complaint filed by the Carpenters' is hereby dismissed.

CONCURRING OPINION OF BOARD MEMBER C. A. BALLENTINE; July 19, 1991

1. I concur with the decision. However, it is unfortunate that the Carpenters' chose prematurely to use the picket line process when they had other provisions of the Act available to them.

2. The picket line should have been the last resort, especially when the Carpenters' had no members employed on the Welland Canal project. Although the Engineers and Teamsters respected the Carpenters' legal picket line, they were ordered back to work by the Board, emanating from Peter Kiewit's complaint under section 135 of the Act as they were not in a legal strike position.

3. If the position taken by Kiewit in bargaining was really as the Carpenters' assert that it was, it is beyond me why the Carpenters' did not choose the routes available to them from this Board under sections 15 or 40a of the *Labour Relations Act*.

CONCURRING OPINION OF BOARD MEMBER J. LEAR; July 19, 1991

1. I concur with the decision. There is no indication of any unfair labour practice in the material presented. The employer simply had confidence that the construction activities called for fell within the range of skills of workers who could be supplied by the Labourers' union. Added to this were supporting factors of economy and efficiency. Whether or not the employer's decision was in error (given the clouded and undefined areas of overlap in work of this nature) was an issue best determined by the jurisdictional disputes machinery available to the Carpenters'.

2. In electing to take the alternative and, though lawful, somewhat uncompromising route of a picket line, the Carpenters' effectively limited both their own options and those of the employer.

3. Furthermore, the direction taken by the Carpenters' created the circumstances whereby the Labourers' certification application could be filed.

4. It is unfortunate that the Carpenters' chose to ignore well-established processes available to them under the *Labour Relations Act*.

0498-89-R; 0499-89-R Amalgamated Transit Union, Local 113, Applicant v. STM Specialized Transit Management Corporation, All-Way Transportation Corporation, Toronto Transit Commission, Respondents

Related Employer - Sale of a Business - "TTC" contracting with "STM" for provision of station wagon services for the ambulatory disabled - "TTC" having earlier contracted with "All-Way" for provision of similar services - Board concluding that terms of commercial contract between "TTC" and "STM" not resulting in "TTC" retaining control of subcontracted services - Related employer application as between "TTC" and "STM" dismissed - Parties agreeing that "All-Way" and "STM" carrying on related activities under common control or direction - Board satisfied that union's bargaining rights undermined by transfer of contract with "TTC" from "All-Way" to "STM" - Board making section 1(4) declaration as between "All-Way" and "STM"

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *J. A. Ronson* and *J. Redshaw*.

APPEARANCES: *Jim Fyshe, Earle Fitzsimmons* and *Rick Jones* for the applicant; *B. R. Baldwin, Liz Keenan, Ray Hould* and *Rudy Stehle* for STM Specialized Transit Management Corporation and All-Way Transportation Corporation; *Douglas Grey, Bruce H. Stewart, Ian McPherson, Guy Giorno, Roger Winter, Heinz Hustedt* and *Tim Oke* for Toronto Transit Commission.

DECISION OF THE BOARD; July 30, 1991

1. In these applications, for ease of reference, the applicant Amalgamated Transit Union, Local 113 will be referred to either as "the applicant" or "the union" and the respondents STM Specialized Transit Management Corporation, All-Way Transportation Corporation and Toronto Transit Commission, will be referred to collectively as the respondents and individually as "STM", "All-Way" and "the TTC", respectively.
2. File No. 0498-89-R is an application under subsection 1(4) of the *Labour Relations Act* for a declaration that STM and All-Way be treated as constituting one employer for purposes of the Act and, or in the alternative, that STM and the TTC be treated as constituting one employer for purposes of the Act.
3. File No. 0499-89-R is an application under section 63 of the Act for a declaration that, as the result of a sale of business within the meaning of the section, STM is the successor employer to All-Way and, or in the alternative, a declaration that the TTC is the successor employer to STM.
4. The union is seeking identical relief in each application. In addition to the declarations referred to in paragraphs 2 and 3, the applicant seeks certain other specific declarations and directions relating to the applicant's bargaining rights for employees of All-Way now alleged to be binding on STM and/or the TTC pursuant to subsection 1(4) and/or section 63 of the Act.
5. All-Way and STM admitted in their replies to the application under subsection 1(4) of the Act that "... they are factually related employers within the meaning of [subsection 1(4) of the Act]." Both companies are wholly-owned subsidiaries of Vitran Corporation Inc. ["Vitran"] and operate under common control and direction and carry out related activities." They asserted, however, that the Board should not exercise its discretion under subsection 1(4) to declare that they be treated as constituting one employer for purposes of the Act. Their counsel reiterated those positions at the hearing into the applications. With respect to the alleged sale of a business from STM to the TTC, counsel for the applicant advised the Board at the end of his argument-in-

chief that he would not be pursuing that part of the application in File No. 0499-89-R. Therefore, that application is dismissed insofar as it pertains to an alleged sale of a business from STM Specialized Transit Management Corporation to the Toronto Transit Commission within the meaning of section 63 of the Act. The remaining issues raised by these applications are:

- (1) whether All-Way and STM and/or STM and the TTC should be declared as constituting one employer for purposes of the Act;
- (2) whether STM should be declared the successor employer to All-Way under section 63 of the Act; and,
- (3) what further relief should be granted if one or more of those declarations are made.

6. The Board heard the testimony of Ray Hould and Rudy Stehle for All-Way and STM, Bryan Millsip and Robert J. Thacker for the TTC, Earle Fitzsimmons and Charles B. Johnson for the union. Hould is vice-president of transportation of Vitran Corporation Inc., referred to at paragraph 5 above, and president of STM and All-Way. Stehle is general manager of STM and was general manager of Para-Way Transportation Division of All-Way (hereafter "Para-Way"). Millsip and Thacker are, respectively, assistant general secretary and manager, employee relations of the TTC. Fitzsimmons was shop steward and grievance officer for the union at Para-Way and the TTC. Johnson is president and business manager of the union. Their testimony was heard during six days of hearings within a two-month period. In addition to their *viva voce* evidence, a substantial volume of documentary evidence was introduced through them.

7. The Board has reviewed and assessed their testimony and the documentary evidence in making its findings of fact set out in the decision, but it will not attempt to summarize the evidence. There was little dispute respecting the significant facts. In the few instances where it was necessary for the Board to resolve conflicts or inconsistencies in the testimony of the witnesses, the Board has resolved them having regard for the usual criteria for assessing credibility, the submissions of the parties and what is reasonably probable in the circumstances.

8. These applications relate primarily to the provision of dedicated small vehicle service for the transportation of the physically handicapped in Metropolitan Toronto (hereafter "Metro"). It is a transportation service by reservation for the ambulatory disabled. At the date of making of these applications, STM was providing the service for the TTC under contract with the TTC as part of its Wheel-Trans service for the disabled. The events giving rise to the applications began in 1987. In order to put those events, and others, into context, it is useful to set out the relevant, significant facts in order of their historical development.

9. The TTC has contracted out various transportation services for the disabled for some 15 years prior to these applications. A variety of vehicles have been used to provide these services, including Mighty Mite vans, station wagons and Orion II buses. The vans and the station wagons were owned by the contractor, the Orion buses were owned by the TTC. All vehicles were driven and serviced by employees of the contractor. At all relevant times the contractor has been All-Way, and it or its Para-Way division operated the transportation services. The most recent (and the last) contract between All-Way and the TTC was executed May 24, 1983 to be effective from November 1, 1983 until October 31, 1986, with an option to the TTC to extend it for a further two years until October 31, 1988. The TTC exercised its option. These transportation services for the disabled have become known collectively as the TTC Wheel-Trans service, although the term "Wheel-Trans" does not appear in the TTC's contract with All-Way. Since the latter part of 1982 for full-time drivers and since 1983 for full-time maintenance employees, All-Way operated the

Wheel-Trans service until the end of its contract with the TTC under the terms of collective agreements between it and the union. The drivers and maintenance employees were covered by separate agreements. The last agreements were for the period January 1, 1988 to December 31, 1988. The parties to those agreements were the Para-Way division of All-Way and the union.

10. All-Way provided Wheel-Trans service prior to 1983 with its own vehicles and was responsible for the taking of reservations for and the scheduling and dispatching of the service. In 1983, the TTC took over reservations, scheduling and dispatching. All-Way continued to own, operate and service the vehicles to provide the transportation service necessary to meet the TTC schedules. In 1984, All-Way added station wagons to its fleet to provide a dedicated, small vehicle service for the ambulatory disabled. There is some evidence, although not entirely clear, that a limited service had been provided previously by taxis arranged for by All-Way but not operated by it. That arrangement, whatever it was, ceased after All-Way had built its station wagon fleet to approximately 27 vehicles. Para-Way also had provided, until November 30, 1988, a non-dedicated (in other words, unscheduled) service, on request of the TTC dispatcher, as needs arose. Beginning in 1984, Orion II buses were introduced to phase out the Mighty Mite vans. The Orions were owned by the TTC but manned, operated and maintained by All-Way.

11. The TTC, at a special meeting on May 26, 1987 adopted a report of one of its commissioners setting out "A Plan for Enhanced Public Transit Services for the Mobility Disadvantaged" and recommended it to Metro Council for its approval and adoption. The Plan included the recommendations that the TTC "... assume the operation of all aspects of the Wheel-Trans service by TTC staff at the conclusion of the current contract." and that Metro Council be asked to "... concur in the [TTC's] decision to fully integrate the Wheel-Trans service, ...". Metro Council gave its approval in December 1987 to the TTC assuming all aspects of the Wheel-Trans service on the expiry of All-Way's contract, October 31, 1988, or any extension of it necessary to an orderly take over.

12. All-Way was opposed to any plan which would remove from the private sector the opportunity to bid competitively for the provision of Wheel-Trans service and it waged a vigorous, but ultimately unsuccessful campaign with the TTC and Metro Council. Late in 1987, All-Way and the union began negotiations for renewal of the collective agreements covering its drivers and maintenance employees. All-Way proposed that they be renewed for a three-year term on the grounds that the TTC might not be in a position to take over all of the service by October 31, 1988. The union would not accept that term or a two-year term later proposed by All-Way. The parties eventually reached a settlement in May 1988 for a one-year renewal to December 31, 1988. During the negotiations the union advised All-Way that the TTC had agreed that it would recognize the union as bargaining agent of any All-Way employees who transferred to the TTC with the Wheel-Trans service. The union made it clear to All-Way that it did not want the All-Way collective agreements to become binding on the TTC after All-Way's contract with the TTC expired because the union believed it could negotiate a better agreement directly with the TTC. The evidence is equivocal as to whether Johnson, the union spokesman in the negotiations, stated expressly that the union did not intend to seek to have the TTC declared a successor or related employer to All-Way for that reason, but he clearly intended that the All-Way collective agreement not flow through to the TTC.

13. The basis of the union's advice to All-Way that the TTC had agreed to recognize it as bargaining agent for any employees transferring to the TTC with the Wheel-Trans service was a letter dated September 4, 1987 which it received from the TTC and which states:

This will confirm our advice to you that if and when the T.T.C. takes over the operation of "Wheel-Trans", A.T.U. Local 113 will be recognized as bargaining agent for those employed by

the T.T.C. in the Wheel-Trans operations. In addition, and in order to assist in an orderly transition of the Wheel-Trans operations from All-Way Transportation to the T.T.C., the T.T.C. will engage in discussions with Local 113 pertaining to employees involved in the Wheel-Trans operations.

In a letter dated March 18, 1988 from the TTC to the union, the TTC expressed its willingness to negotiate collective agreements to include the Wheel-Trans service. It states in major part:

As you are aware, the Commission has been mandated to integrate those operations of Wheel-Trans currently being performed by a private contractor. This is to advise you that the Commission is prepared to meet with representatives of Local 113 in order to negotiate the establishment of Collective Agreements to encompass the future Wheel-Trans Operations. These negotiations will obviously involve reaching agreements in the areas of wages, benefits, working conditions, and job security.

The union and the TTC began negotiations shortly after that letter and reached a settlement in September 1988. The settlement produced two memoranda for the Wheel-Trans service, one for drivers and the other for maintenance employees. Each memorandum required that All-Way employees who wished to transfer to the TTC declare their intentions by October 15, 1988.

14. There is a factual dispute between the union and the TTC as to whether the TTC intended to take back the entire Wheel-Trans service. It is suffice for now to say that whatever the TTC's intentions were, at the very least, it sought and obtained Metro Council's approval to take over the entire Wheel-Trans service being operated by All-Way at the expiry of All-Way's contract with the TTC. That was to be October 31, 1988, but the contract was extended to December 31, 1988 in order to accommodate the transition of service. Whatever the TTC's intent had been, in May 1988 it began steps to contract out a small vehicle service. It eventually sought and obtained Metro Council's approval in October 1988 to continue to contract to one or more contractors the operation of small vehicles for transportation of the ambulatory disabled for a period of 36 months beginning January 1, 1989. The apparent basis of approval was that the continued contracting out for that period would be cost effective and would leave the TTC with a common fleet (presumably of buses) to maintain. It would also allow time for the TTC to identify a suitable wheelchair - accessible small vehicle, which the TTC would own, to replace the station wagons.

15. The TTC invited a proposal for dedicated small vehicle and non-dedicated small vehicle transportation services for the ambulatory disabled. At the time, All-Way was providing through its Para-Way division, the dedicated small vehicle services under the terms of its contract with the TTC which had been extended until December 31, 1988. STM, not All-Way, submitted a proposal on November 15th for the dedicated small vehicle service. STM had been incorporated by Vitran for objects which included providing specialized transportation services for the disabled. It was incorporated in November 1988. Vitran apparently wanted to have a clear separation of its scheduled school bus operations and its transportation services for the disabled. All-Way operates the school bus transportation service and its Para-Way division had been created to distinguish between the two services. Para-Way was not a separate corporation. There is no doubt that when STM made its bid it traded substantially on its relationship with Para-Way through Vitran. In fact, STM counsel conceded in final argument that STM had relied on Para-Way's goodwill with the TTC in promoting its own qualifications to provide the dedicated small vehicle service.

16. The TTC rejected STM's proposal, apparently on the basis of the cost to the TTC for the service. On or about December 13, 1988, it awarded a contract for the non-dedicated service to a taxi company, Able Atlantic. The dedicated small vehicle service also was awarded to Able Atlantic, but on an interim basis. The union served notice on the TTC in a letter dated December 14th that the union denied "... that the T.T.C. has the right to contract out any part of the Wheel-

Trans Bargaining Unit work, and particularly any part of such work which is presently being performed by Para-Way [drivers].” The union’s position at that time was based on the inference it had drawn from the TTC’s position in negotiations that it would contract out the Wheel-Trans service if the parties failed to conclude a collective agreement for the service. The union drew the inference from that position that there would be no contracting out of Wheel-Trans service if the parties concluded a collective agreement. The union was aware before negotiations settled that the TTC was not going to take over All-Way’s station wagons. The letter also served notice that a grievance would be filed if the TTC persisted in attempting to contract out the work. The union did file a grievance dated February 7, 1989. All-Way’s contract with the TTC expired on December 31, 1988. All of its Para-Way division bargaining unit employees had opted to transfer to the TTC effective January 1, 1989. All-Way’s collective agreements with the union also expired as of December 31st, by which date neither party had given notice either to terminate the agreement or negotiate amendments to it. In such circumstance, each agreement provides that it “... shall continue automatically ... for periods of one year each ...”. When Johnson was asked in cross-examination why the union had not served notice on All-Way to negotiate a renewal of the agreements, he replied to the effect that All-Way would have thought he was crazy. All-Way had given conditional notice of termination of employment on October 5, 1988, to be effective January 1, 1989, to all of Para-Way’s staff and bargaining unit employees and their employment ceased with Para-Way in keeping with the notice.

17. The TTC informed STM early in February 1989 that some of the bid conditions in the TTC’s original invitation could be revised were that to result in a revised proposal from STM that would yield a lower cost to the TTC than STM’s original proposal. STM submitted a revised proposal. The TTC advised STM on March 2nd that its revised proposal had been accepted for a three-year period beginning April 1st, 1989, with an option to the TTC to renew it for two years. STM began the dedicated small vehicle service on March 20th at the TTC’s request, although the parties had not executed a formal contract. STM’s original proposal had been predicated upon STM contracting with “individual owner/operators” to provide the necessary vehicles and drivers. There were two reasons for doing so. First, based on the experience of other Vitran subsidiaries which used owner/operators, STM expected their use to result in a more cost-effective way of delivering the level of dedicated small vehicle service specified by the TTC. Second, the Para-Way drivers were not available. They had all committed themselves for transfer to the TTC by October 15th. The TTC formally agreed in a letter to STM dated April 19, 1989, that STM would have the contractual right to supply the service based on sub-contracting with owner/operators. That is the way the service began on March 20th. Union counsel wrote to STM on March 21st claiming that, pursuant to subsection 1(4) of the Act, the union was bargaining agent for a unit of drivers similar to the bargaining unit in the expired collective agreement between the union and the Para-Way division of All-Way. These applications were made May 4th and claimed to be made without prejudice to the grievance. No similar application had been made earlier when Able Atlantic was awarded the contract for non-dedicated small vehicle service and awarded the dedicated service on an interim basis, and none was made at or after the making of these applications.

18. STM operates the dedicated small vehicle service from the same office which Para-Way had used. It does not use any of the other All-Way properties which Para-Way had used when it provided the service. In addition to Stehle who had been retained from Para-Way’s operation, STM hired back Stehle’s former secretary, two former dispatchers and one staff. The staff employee became STM’s safety supervisor. One of the dispatchers had transferred to the TTC and was hired back from there. One of the owner/operators was a former Para-Way driver who had transferred to TTC. All of the station wagons leased by Vitran’s leasing company to the owner/operators to begin the service had been used by Para-Way. 27 station wagons serve 27

routes. They are equipped with the same two-way radios served by the same frequency as Para-Way had used.

19. STM provides the same station wagon service for the ambulatory disabled through its owner/operators and their drivers as Para-Way had provided until December 31, 1988 with its drivers under the terms of its collective agreement with the union. The scheduled hours of service are the same under STM's contract as they were under Para-Way's, although the routes are run differently. The TTC supplies STM with the daily schedule from which STM prepares the run sheets for each route. Drivers organize their own routes for completing their run sheets. Alterations to run sheets resulting from cancellations, or additional orders are received by STM from the TTC and dispatched by STM radio to the drivers. The TTC does not have direct radio access to STM's frequency.

20. The agreement between the TTC and STM contains a variety of conditions affecting the operation of the dedicated small vehicle service. The TTC specifies such things as the colour and passenger capacity of the station wagons and that they be equipped with air conditioning and two-way radios. They also must bear signs identifying the vehicles with the TTC and its Wheel-Trans service. STM uses removable signs. The TTC requires STM to have the vehicles inspected for mechanical fitness three times a year at a TTC-approved station. The TTC can require STM to have a vehicle removed from service. Drivers are not uniformed, but must satisfy a dress code set by STM and approved by the TTC. They also must undergo STM's driver training program required and approved by the TTC which also has the right to monitor the program. The service operates the same hours as the rest of the Wheel-Trans service and STM cannot alter the hours of service. The TTC sets the fares for the service and STM collects the fares for the TTC. STM must advise the TTC of any vehicle accident involving personal injury or causing a delay in competing the routes. TTC inspectors have nothing to do with STM's vehicles in the Wheel-Trans service. Nor does TTC tell STM which drivers or vehicles to use for a route or the route to be taken in picking up and delivering passengers. STM performs its obligation under the agreement without directions from the TTC on how to do so.

21. The applicant's primary claim for relief, as asserted in final argument, is that STM and the TTC carry on related businesses or activities under common control or direction within the meaning of subsection 1(4) of the *Labour Relations Act*, and ought to be declared as constituting one employer for purposes of the Act. Applicant counsel submits that the declaration would extend bargaining rights which the union has for TTC employees to cover the drivers of the station wagons operated by STM under its contract with the TTC. Subsection 1(4) states:

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

In the alternative, the applicant claims that STM is the successor to All-Way as the result of the sale of a business within the meaning of section 63 of the Act and that STM and All-Way carry on related businesses or activities under common control or direction within the meaning of subsection 1(4) of the Act and ought to be treated as constituting one employer for purposes of the Act. The relevant provisions of section 63 state:

63. (1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

22. Applicant counsel argues, correctly in the Board’s view, that either of these declarations respecting All-Way and STM would bind STM to the collective agreement between the union and All-Way.

23. Applicant counsel did not address directly the question of whether STM and the TTC carried on “... associated or related activities or businesses ...” with respect to the union’s primary position. It is implicit in his submissions, however, that the operation of the dedicated small vehicle service, referred to colloquially by the parties as the station wagon service, for the ambulatory disabled was the associated or related activity or business carried on by STM and the TTC. Counsel for the TTC, without conceding that those two parties carried on associated or related activities or businesses within the meaning of subsection 1(4), argued that there was no common control or direction of the station wagon service as between STM and the TTC. The Board is prepared to assume for purposes of this branch of the union’s claim for relief, that STM and the TTC carry on associated or related activities or businesses respecting the station wagon service for the ambulatory disabled.

24. The Board acquires the discretion under subsection 1(4) of the Act to make a “one employer” declaration when the following conditions are present:

- (1) there must be two or more entities;
- (2) they must carry on associated or related activities or business, whether or not simultaneously; and,
- (3) the activities or businesses must be under common control or direction of the entities.

The first condition is obviously satisfied with respect to STM and the TTC and STM and All-Way.

25. The Board turns first, then, to the argument of union counsel that STM and TTC exercise common control or direction over associated or related activities or businesses. Counsel submits that the Board has interpreted subsection 1(4) to mean that it is the activities or businesses, not the entities themselves, over which the exercise of common control or direction must be found

to exist. In this respect, counsel relies on the Board's analysis of how the words of the subsection should be construed at paragraph 105 of *Brantwood Manor Nursing Home*, [1986] OLRB Rep. Jan. 9. The Board concluded that the subsection required only that the activities or the businesses of the two or more entities be under common control or direction, not that the entities themselves also be under common control or direction.

26. The assumed, related activity is the operation of the station wagon service for the ambulatory disabled. The TTC has provided a service for the ambulatory disabled for approximately 15 years, but there is no evidence that it has been provided by direct employees of the TTC. In fact, it may be readily and reasonably inferred from the evidence that the service has been provided by subcontract. During most of that time the subcontractor has been an entity of the present Vitran organization, primarily All-Way and latterly its Para-Way division. STM was incorporated by Vitran to specialize in transportation of the disabled. Its contract with the TTC was its first in that field and, at the time of these proceedings, its only one. It is obvious that there is no common ownership between STM and the TTC and, on the evidence, their business operations are under different management. Consequently, the applicant relies on the terms of the *de facto* commercial contract between them by which, he contends, the TTC has retained effective control of the station wagon service. They had not executed a formal contract at the time of these proceedings. Counsel for the applicant referred the Board to the following authorities in support of his proposition that the TTC retains effective control of the station wagon service under the terms of the contract: *The Ontario Legal Aid Plan*, [1989] OLRB Rep. Dec. 1176; *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9; *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293; and, certain decisions referred to in those cases. TTC counsel does not dispute that common control or direction over an activity or business might be found in the terms of a commercial contract between two contracting parties. He contends, however, that the provisions in the contract between the TTC and STM which the applicant claims leave effective control or direction of the station wagon service with the TTC are nothing more than the prudent terms which parties to a commercial contract would include to protect their respective interests. Counsel submits that those terms do not amount to the TTC retaining control of the subcontracted service, as the Board has discussed when deciding whether control or direction has passed to the subcontractor for purposes of a subsection 1(4) declaration. To the contrary, counsel argues, the TTC has passed control of the station wagon service to STM, and has done so to an even greater extent than was the case with Para-Way. TTC counsel submits that the following authorities support his claim that the TTC has not retained control over the station wagon service and has passed control of it to STM: *Metropolitan Life Insurance Company*, [1989] OLRB Rep. Feb. 175; *The Globe and Mail*, [1988] OLRB Rep. April 384; *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923; *Federated Building Maintenance Company Limited*, [1985] OLRB Rep. Nov. 1585; *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. Aug. 1060; *Complete Car Care Centre*, *supra*; and, *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536.

27. The authorities relied on by both counsel demonstrate clearly that the Board has accepted the proposition that the terms of a commercial contract between two or more nominally dependent entities can be brought within the reach of subsection 1(4) of the Act. Whether such entities are under common direction or control within the meaning of that subsection depends on whether control over work which is the subject of the contract has passed to the subcontractor, or whether the employer with the collective agreement obligation simply has substituted the subcontractor's employees for its own without giving up control and direction of the employees. See *Charming Hostess*, *supra*, at paragraphs 42-44. The Board described the issue this way in *Caressant Care*, *supra*, at paragraph 5:

The question is whether, on an on-going basis, the contractor really has taken over control and

responsibility for the selection, training and supervision of the employee work force, and is duly dependent in making the decisions that it does.

The contractor in that application had been engaged to provide on-site dietary and housekeeping services in a new nursing home operated by Caressant Care, supplying the employees and on-site supervision for those services.

28. While the Board agrees with TTC counsel that the terms of the TTC's *de facto* contract with STM reserves less control to the TTC than the predecessor contract under which Para-Way operated the station wagon service, that is irrelevant to whether the TTC has passed control over the service to STM under its contract. The Board has reviewed that contract and, in particular the terms which the applicant argues should cause the Board to conclude that the TTC has retained effective control over the station wagon and, as a result, that STM and the TTC are under common control or direction. The Board finds it unnecessary for purposes of this decision to detail those terms. This is because the Board finds the factual context of the contractual relationship between the TTC and STM to be sufficiently analogous to that of the contractual relationship of the municipality and the contractor in the *City of Stratford* decision, *supra*, to adopt its reasoning and conclude that the TTC has passed control of the station wagon service to STM. The Board disagrees with TTC counsel that the facts of this subsection 1(4) application are on all fours with the facts in the *City of Stratford* application but the Board agrees that its facts make out a stronger case for the applicant's position herein than do the facts of the instant case.

29. The Board in the *City of Stratford*, *supra*, had been asked to declare that the firm with which the City had contracted to collect its garbage and the City be treated as one employer for purposes of the Act. The decision at paragraphs 10 and 11 sets out in substantial detail some of the contractor's responsibilities. The Board observed that, since the contractor was "... owned and operated ... completely independently of the City, ...", if common control or direction existed between them it had to be found in the degree of authority that the City can or does exercise over the contractor's operations for the City. Then, after examining the terms of the contract, the Board concluded that the City had given up functional control over the employees who perform the garbage collection work, that the control which it retained was merely that which, as a matter of commercial reality, was sufficient to ensure that the contractor met at all times the City's general specifications and requirements. The Board was not persuaded that such control "... evidences common control or direction of the garbage collection work in the City by [the contractor] and the City.". In the Board's view in this instant application, the City's contract with the contractor imposed more stringent controls on the contractor's performance of its services to the City than are imposed on STM by its contract with TTC. Moreover, the TTC does not exercise any control or direction over STM's owner/operators. It is STM which selects, engages and trains them, establishes their dress code, disciplines them, sets their rates of remuneration and assigns them to routes. In short, STM and not the TTC exercises fundamental control over the working environment of the owner/operators.

30. Accordingly, the Board finds that STM and the TTC are not under common control or direction and it is unnecessary for the Board to decide whether they carry on related activities or businesses. In the result, the application in File No. 0498-89-R for a declaration that STM and the TTC be treated as constituting one employer for purposes of the Act is dismissed.

31. The applicant's alternative position is that STM is the successor to All-Way as the result of a sale of a business within the meaning of section 63 of the Act and that STM and All-Way carry on related activities or businesses under common control or direction within the meaning of subsection 1(4) of the Act and ought to be treated as one employer for purposes of the Act. While applicant counsel argued the "sale" alternative first and described the "one employer" declaration

as its fall back position, the Board finds it appropriate to deal first with the related employer alternative.

32. Counsel for All-Way and STM admitted that those two entities did carry on related activities or businesses under common control or direction within the meaning of subsection 1(4) of the Act. The evidence clearly supports that admission. Therefore, the Board finds that STM Specialized Transit Management Corporation and All-Way Transportation Corporation carry on associated or related activities or businesses under common control or direction within the meaning of subsection 1(4). Accordingly, the preconditions referred to at paragraph 24 herein have been satisfied and the Board has acquired the discretion to make a "one employer" declaration. The question is whether the Board ought to make the declaration.

33. Applicant counsel's argument in support of the Board exercising its discretion to declare All-Way and STM to be treated as one employer for purposes of the Act is simple and straightforward. That is, STM's contract with the TTC has resulted in the station wagon service being provided non-union by STM, whereas All-Way previously had provided it using employees for whom the applicant held exclusive bargaining rights. The applicant is not contending that the result was intended by either STM or All-Way when STM entered into its contract with the TTC. Counsel argues both subsection 1(4) and section 63 are designed to protect established bargaining rights from the effect of commercial transactions, whether or not the transaction was intended to erode or interfere in those rights. Therefore, since the effect of the STM/TTC transaction would be to eliminate altogether the applicant's bargaining rights defined in its collective agreements for drivers with All-Way if the Board does not declare All-Way and STM to be treated as constituting one employer for purposes of the Act, the Board ought to make that declaration.

34. Counsel for All-Way and STM, on the other hand, emphasized that there was no scheme or intent to interfere with the applicant's bargaining rights when STM entered into the contract with the TTC for operating the station wagon service. Counsel argued that there are three types of circumstances in which the Board has found there to be a scheme to avoid bargaining rights obligations and in which the Board has made a one-employer declaration. These are where two related employers exist, one "unionized" and the other "non-union" and:

- (1) the unionized company is deliberately wound down and its work transferred to the non-union company; or
- (2) employees are transferred between the two companies; or,
- (3) the non-union company is used to circumvent prohibitions or limitations in the collective agreement on the unionized company contracting out bargaining unit work or using employees who are not in the bargaining unit to perform work normally performed by bargaining unit employees.

Counsel submits that All-Way's business was taken back by the TTC and both that circumstance and putting out the station wagon service to public tender was beyond its control; that there were no employees to transfer to STM, since all of All-Ways employees either had their employment terminated or had accepted transfer to the TTC; and, there was no attempt to get around any contracting out prohibitions or limitations because the collective agreement covering drivers had no limitations on contracting out or on non-bargaining unit employees performing that work. Therefore, none of the circumstances which have moved the Board to make a one-employer direction in order to protect subsisting bargaining rights are present here.

35. Finally, counsel argued that, unless the Board found that there was a scheme to defeat or erode the applicant's bargaining rights, it should not make a one-employer declaration because to do so:

- (1) would be dramatic interference with a public bid system which led to a contract premised on the use of independent contractors (owner/operators);
- (2) would seriously undermine STM's contract with the TTC respecting their agreement that STM was to provide the station wagon service by contracting with independent owner/operators and might nullify the contract between STM and the TTC;
- (3) might nullify STM's contracts with the owner/operators because the Act prohibits STM from contracting with individual employees; and,
- (4) would deprive any persons who have contracted with STM to provide station wagon service and who might be found to be dependent contractors under the Act, of their right to select their bargaining agent and, further, would foist on them the wages, benefits and other terms and conditions of employment of the applicant's last collective agreement with All-Way.

With respect to the need for "mischief", "intent" or a "scheme" to defeat or erode a union's bargaining rights or to avoid obligations under a collective agreement in order to justify the making of a one-employer declaration, counsel referred the Board particularly to *Acto Builders (Eastern) Limited*, [1979] OLRB Rep. June 465, at paragraphs 15 and 16, and *Inducon Construction of Canada Limited and Codeco Limited*, [1975] OLRB Rep. Apr. 399, at paragraphs 18 and 19.

36. For all of these reasons, counsel submits that the Board should not declare that All-Way Transportation Corporation and STM Specialized Transportation Management Corporation are to be treated as constituting one employer for purposes of the *Labour Relations Act*.

37. The Board does not agree with counsel for All-Way and STM that there need be intent or a scheme to interfere with the bargaining rights of a trade union or to avoid obligations under a collective agreement before the Board will exercise its discretion under subsection 1(4) and declare that two or more entities be treated as constituting one employer. That was made clear by the Board in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 at paragraph 12 as quoted in *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9, at paragraphs 48 and 49, one of the authorities relied on by applicant counsel. In discussing the nature and purpose of subsection 1(4), the Board in *Brant Erecting* takes note of the similarity of its remedial purpose to that of section 63 and states, "[n]either remedial provision requires a finding of anti-union animus: their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights.". For the applicant, the substitution of STM for All-Way as the entity to bid for the remaining, available Wheel Trans business from the TTC (which STM obtained) meant the loss of the work to which its bargaining rights attached, unless it succeeded in these applications. As counsel for the applicant put it so succinctly in final argument, "If the applicant loses this case, it loses all of its bargaining rights". That aptly describes the effect of denying a one-employer declaration even though the preconditions for the exercise of the Board's discretion exist and the erosion of bargaining rights has been established. It has the same effect as a successful application for the termination of bargaining rights.

38. As for the commercial implications of a one-employer declaration for STM's contract with the TTC and with contracts with the owner/operators, it is clear that the purpose of subsection 1(4) of protecting established statutory rights takes precedence over the protection of any commercial transactions which might be impacted by a declaration. As the Board stated when describing the purpose of subsection 1(4) at paragraph 12 of *Brant Erecting, supra*:

"Section 1(4) was enacted in 1971 and deals with situations where economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which the activity is carried on. *Legal form is not permitted to dictate or fragment a collective bargaining structure, nor will alterations in legal form undermine established bargaining rights.*"

[emphasis added]

The "definable commercial activity" here to which the applicant's bargaining rights attach, is the contracting with the TTC for the provision of the dedicated small vehicle service for the transportation of the physically handicapped in Metropolitan Toronto. It was formerly done by All-Way and is now being done by STM. A declaration that All-Way and STM are to be treated as constituting one employer for purposes of the Act would preserve that attachment and make All-Way and STM "...jointly and severally bear the obligations..." of the employer under the collective agreement for drivers between the applicant and All-Way. See *Brantwood Manor, supra*, at paragraph 93. The fact that STM and the TTC entered into a contract by which they agreed that the dedicated small vehicle service (i.e. the station wagon service) should be provided by owner/operators under contract to STM and the fact that STM entered into contracts with owner/operators to provide the service ought not, at least in the circumstances of this case, be a basis for denying the applicant, an innocent third party, the statutory protection provided by a one-employer declaration for its bargaining rights under its collective agreement with All-Way.

39. This is not to say that there are no circumstances in which commercial contracts impacting on the commercial activity which gives rise to the collective bargaining relationship would not be relevant and deserving of significant weight in deciding the exercise of the Board's subsection 1(4) discretion. There well may be particular circumstances, for example, where bargaining rights have existed in a Board certificate or a voluntary recognition agreement for more than 12 months and no collective agreement has been executed, in which the Board might give substantial weight to the commercial obligations of the related non-union employer.

40. Had All-Way, on expiry of its contract with the TTC, entered into a new contract with the TTC containing the same terms as the contract between STM and the TTC, and then entered into contracts with owner/operators with the same terms as STM's contracts with them, the applicant, at the very least, would have had access to arbitration under its collective agreement with All-Way to try and protect its bargaining rights and enforce the terms and conditions of the agreement. That is what the applicant would get out of a declaration that All-Way and STM be treated as constituting one employer for purposes of the Act and are bound to the collective agreement for drivers between All-Way and the applicant. Should the parties be unable to agree on what the collective agreement obligations are, it would be open to either of the parties to pursue the dispute to arbitration, including the questions of whether any of the persons providing the station wagon service are employees under the drivers' agreement and whether STM has breached the collective agreement because of the terms under which it engaged the owner/operators to perform the service.

41. That would still be the case were the Board to determine that the owner/operators were not employees within the meaning of the Act. It would remain an arbitrator's task to determine whether they, or any of them, were employees under the collective agreement. Therefore it is unnecessary for the Board to determine the employment status of the owner/operators in order to decide how to exercise its discretion under subsection 1(4).

42. In all the circumstances of this application, the Board is satisfied that the applicant's bargaining rights in its collective agreement for drivers with All-Way have been undermined by the transfer from All-Way to STM of the contracting with the TTC for the provision of the dedicated small vehicle service for the transportation of the physically disabled. Accordingly, in order to preserve those bargaining rights, the Board declares that All-Way Transportation Corporation and STM Specialized Transit Management Corporation are to be treated as constituting one employer for purposes of the *Labour Relations Act* effective from the incorporation of STM and, as a result, STM is bound to the collective agreement for drivers between All-Way and the applicant effective from the date when STM began to operate the dedicated small vehicle service for the TTC and, to the extent that the collective agreement may have continued to renew under its terms for renewal, must continue to apply its terms *mutatis mutandis*. Since the other remedies sought were not pleaded in final argument, the Board will make no further declarations or directions.

43. As between All-Way and STM, the applicant pleaded section 63 in the alternative and requested the same additional remedies. Since a declaration under section 63 would do nothing more for the applicant than the one-employer declaration, there is no need to decide that application and those proceedings are terminated.

44. The applications for declarations under subsection 1(4) and section 63 of the *Labour Relations Act* respecting the Toronto Transit Commission were dismissed for the reasons given earlier in the decision.

2134-90-U Perino Smith, Complainant v. CAW-TCA Canada Local 112 & The De Havilland Aircraft Company of Canada / A Division of Boeing of Canada Ltd., Respondent

Duty of Fair Representation - Unfair Labour Practice - Complainant arguing that union's failure to process overtime grievance to arbitration violating the Act - Board finding that union considered grievance on its merits, taking into account relevant matters, and acted reasonably in coming to its decision that grievance would not succeed at arbitration - Complainant dismissed

BEFORE: K. G. O'Neil, Vice-Chair.

APPEARANCES: Perino Smith for the complainant; Jerry Dias and Mike Battams for the respondent union; Walter Cormack and Oxford D. Woods for the respondent company.

DECISION OF THE BOARD; July 8, 1991

1. This is a complaint under section 89 of the *Labour Relations Act* that the union has breached section 68. The substance of the complaint is that the union did not process an overtime

grievance to arbitration, and in failing to do so, was in breach of the union's duty of fair representation under section 68.

2. Section 68 provides as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The Board has made it clear in many cases that what is required of a union in relation to a decision on whether or not to take a grievance to arbitration is that it turn its mind to the problem and consider it in a manner free from irrelevant considerations and arbitrary, discriminatory or bad faith behaviour. See, among others, the case of *Domenic Gattellaro*, [1987] OLRB Rep. June 844 at paragraph 9 where the Board said:

Section 68 of the *Labour Relations Act* does not require that a trade union carry a grievance through to arbitration merely because the grievor wants it to do so. Unless the collective agreement gives the grievor that right, it is for the union to decide whether or not to take a grievance to arbitration. Section 68 requires that the union make that decision in a manner which is not arbitrary, discriminatory or in bad faith. It does not provide an appeal to the Board from the union's decision. The question for the Board is not whether the union's decision is the one which this Board would have made in the circumstances, it is whether the union's decision is the result of a process of reasoning grounded on a consideration of relevant matters and free from the influence of irrelevant ones: see *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, 6 CLRB (NS) 134, at paragraphs 36 to 39. The Board has recognized that considerations relevant to a decision whether or not to press a grievance to arbitration include the merits of the grievance and likelihood of its success, the financial commitment involved in proceeding to arbitration and the claims or interests of other individuals or Groups within the bargaining unit who may be affected by the arbitration proceedings and their possible results: see *Catherine Syme*, [1983] OLRB Rep. May 775 at paragraph 120.

3. Mr. Perino has been employed by De Havilland Aircraft Company of Canada for approximately ten years. He started in the classification known as Group 5 Sealer. Most recently, for approximately eight years, he has been in a classification known as Group 6 sealant mixer. In 1986 a second person was promoted to the position of Group 6 sealant mixer, primarily to provide backup and coverage for Mr. Smith when he was not at work as a sealant mixer. The two men worked together in the mixing room sometimes, for instance when two people were needed to lift heavy drums. From time to time, both of them were assigned work as Group 5 sealers when there was no work as sealant mixers, something explicitly provided for in the collective agreement. They also both often worked overtime doing Group 5 sealing work. Mr. Smith estimates he worked on the floor doing sealing work 40% of the time under the supervision of Danny Woods. Mr. Woods does not agree with this estimate, but in the end, nothing turns on this conflict in the evidence. When June Chase took over as supervisor in October, 1988, it is clear that Mr. Smith was no longer assigned to do sealing when there was no mixing to be done during normal non-overtime shifts. When there was no mixing to be done, he might clean the floor or his machine, but was not assigned to Group 5 sealing work. The grievance which is the subject of the complaint deals with the period June 29, 1989 to May 1, 1990, a period during which Ms. Chase was Mr. Smith's supervisor and a period during which Mr. Smith acknowledges he was not assigned to sealing work by Ms. Chase during his normal work week.

4. In March 1989, the company decided that it did not need two people regularly assigned to sealant mixing. It first proposed to rotate Mr. Smith and Mr. Cannella between Group 5 and Group 6 work, which would have required Mr. Smith to start working shifts, which he did not want to do. Mr. Smith argued that because of his superior seniority, he should be able to remain full-

time on sealant mixing. A meeting was held to discuss the problem. In attendance were the two employees involved, Messrs. Smith and Cannella, their supervisor, June Chase, their former supervisor Danny Woods, and Mike Battams, the union committeeman for the area. The company indicated that if Mr. Smith was not to be rotated, Mr. Cannella would be declared surplus.

5. The union convinced the company that Mr. Smith's seniority should give him the right to the mixing work and that declaring Mr. Cannella surplus was an unnecessary step. Given that the collective agreement allowed Group 6 people to be assigned to Group 5 work the company could regularly assign Mr. Cannella to Group 5 work. The union also persuaded the company to continue to pay Mr. Cannella the Group 6 rate in order to give the company the flexibility to have him cover for Mr. Smith when necessary.

6. The current complaint is a dispute which arose over the fall-out of this decision as it related to overtime distribution. The collective agreement provides the following as to overtime distribution:

10.05 In the event of urgent or emergency overtime work for which no qualified employee will volunteer, the Union agrees to co-operate with the Company in providing sufficient qualified workers to perform such work. In all cases, where overtime is worked, the Company agrees to equalize such work among the employees *usually performing such work*. A list of overtime worked will be posted and maintained in the department or area respecting each overtime work Group. The Union may make representations to the Management as to continuing distribution of overtime work which, in the opinion of the Union, may be unfair.

[Emphasis added.]

By contrast, article 3.06 of the collective agreement provides for the equalization of shift work among the employees "usually performing the work in the classification affected".

7. Between the time of Mr. Cannella's promotion to Group 6 in 1986 and March 1989, Mr. Smith and Mr. Cannella were treated the same for overtime purposes, i.e., they were equalized for Group 6 overtime, and offered Group 5 overtime when all Group 5's had been canvassed and there was still overtime work available to be done. Neither Mr. Smith nor Mr. Cannella had been equalized as to Group 5's overtime. The union and the company agreed, as part of the above arrangement in March, 1989 that Mr. Cannella would participate fully in Group 5 work during his regular 40-hour week, working shift work, and being part of the overtime Group that was required to be equalized under Article 10.05. The union and the company also agreed that Mr. Smith would continue to be offered Group 5 overtime when all Group 5's had been canvassed and there was still overtime work available. This had been done regularly in the past as a matter of discretion, but Ms. Chase proposed to stop doing so after Mr. Cannella was participating fully in Group 5 work. As a result of this verbal agreement, this was no longer a discretionary matter; the company was now obliged to offer Mr. Smith any remaining Group 5 overtime. Mr. Smith, for his part, thought that the matter should remain as he says it had been up until that point, which was that he and Mr. Cannella were equalized for overtime, since they were both in the same classification.

8. Accordingly, when he saw on the posted overtime records that Mr. Cannella's overtime was getting ahead of his, he filed the following grievance on June 29, 1989:

I protest the action of the company for failing to ask me for o/t as per terms of a verbal agreement with supr. J. Chase. This was unjust and a violation of the c/a. I demand that the agreement be adhered to and claim full redress for all monies lost.

9. This grievance was worded by Mr. Mike Battams, one of the plant committeemen and

signed by Mr. Smith. A week later, Ms. Chase left the company. Mr. Danny Woods was in charge, as he had been prior to Ms. Chase's arrival. Mr. Battams explained to Mr. Woods that there had been a verbal agreement with Ms. Chase that the previous discretionary arrangement would be adhered to, i.e., when Group 5 overtime was available and no Group 5 person was available to do it, Mr. Smith would be offered it first. Based on that representation the company paid the 24 hours at time-and-a-half that Mr. Smith asked for in the grievance.

10. Time passed and Mr. Smith watched Mr. Cannella's overtime again out-strip his by a substantial margin. Feeling that it should be equalized with his own, he approached Mr. Battams on a number of occasions to get him to file a grievance. It was suggested to Mr. Smith that he did not approach Mr. Battams until December about this, but Mr. Smith says it was earlier. In the end, nothing turns on the timing of this, given my conclusions below. Mr. Battams did not feel that this was the same situation as when he filed the previous grievance. He said the arrangement was not that Mr. Cannella and Mr. Smith would be equalized for overtime, but rather that Mr. Smith would be offered overtime if there were no volunteers from Group 5. He testified that overtime is not equalized by classification, as is shift work. He was of the view that Mr. Smith, although in the same classification as Mr. Cannella, was not normally performing the same work as Mr. Cannella. Accordingly he refused to file a grievance. Mr. Smith spoke to the union's Plant Chairman, Merv Grey, on Mr. Battams' suggestion, as well as the Local President, Mr. Dias, with the same result.

11. Mr. Smith relied on the fact that he had always been equalized with Mr. Cannella in the past, and on his understanding of the collective agreement and company policy in maintaining his position. He presented in evidence an October 4, 1989 memo from the company's Vice-President, Manufacturing, which was circulated in the plant, which reads in relevant part as follows:

It must be understood that equalization of overtime hours is of prime concern. In order to ensure this, the following procedure for weekend overtime is to be followed:

Employees with low hours will be asked for Saturday.

After Saturday's overtime has been added to the total, employees with the lowest hours will then be asked for Sunday. If an employee has refused Saturday overtime, the employee will be asked for Sunday overtime if their hours are significantly lower than others within the work group.

There will be circumstances where continuity of work will necessitate disregarding the overtime hour totals, however, this will be the exception as opposed to the rule.

12. Later in the year Mr. Battams was injured and was off work for a number of months. Mr. Smith persuaded the replacement committeeman that a grievance should be filed. He filed the following grievance for Mr. Smith on May 1, 1990:

I protest the actions of the company for not equalizing overtime within my classification. I deem this to be a violation of the c/a. I demand that this practice cease and demand full redress.

Mr. Battams testified that the difference between the two grievances in his view was that the first concerned the verbal agreement between himself and Ms. Chase which had been violated when Mr. Smith was not offered Group 5 overtime opportunities when there was Group 5 overtime available after all the Group 5 people had been canvassed. In his view, the second grievance had no merit and should never have been filed, since it required equalization of overtime within a classification, rather than among those normally doing the work. The facts as he knew them were that Mr. Cannella was normally doing sealing work forty hours a week, and Mr. Smith was not. Mr. Smith was normally doing sealant mixing rather than sealing, during the relevant time period. Mr.

Battams accordingly thought that neither the collective agreement, nor the 1989 verbal agreement with Ms. Chase, required equalization of Group 5 overtime between Messrs. Cannella and Smith.

13. The May 1, 1990 grievance was filed shortly before negotiations to renew the collective agreement started in June 1990. It is the parties' practice to try to resolve outstanding grievances prior to concluding a renewal agreement. Mr. Dias' uncontradicted evidence was that the members are well advised of this practice, and are told that if they want to know the result of their own grievances after bargaining, to contact their union officer. At the beginning of the 1990 negotiations, there were some seventeen hundred grievances outstanding. The parties were successful in resolving all but approximately a dozen, among which was Mr. Smith's grievance. The union took the position that the company should pay Mr. Smith's grievance, despite its view of its merits, but was unable to persuade the company to do so. The company asked it to be held until Mr. Battams' return to work so that it could be more fully discussed. Mr. Smith thought that there must have been something to the grievance if it had not been dropped at negotiations.

14. Upon Mr. Battams' return to work at the end of August, the company gave notice that it was willing to discuss the grievance again. The bargaining committee invited Mr. Battams to speak to them about the grievance. He gave his view as to why he had been against filing the grievance in the first place and the bargaining committee decided to withdraw the grievance. A majority of the committee must be in favour before the grievance is withdrawn. Mr. Smith was subsequently notified that the grievance had been withdrawn. Mr. Smith was not happy with that result. He had wanted to have his say about the grievance and started calling Mr. Dias, the local president, asking what it meant that the grievance had been withdrawn. He remained unsatisfied and filed this complaint. The evidence indicated that it is normal practice to notify a member of the progress of a grievance after it is filed. It did not indicate that it is normal practice to have the grievor involved in negotiations with the company. The collective agreement provides that the union *may* have the grievor present during step two of the grievance procedure.

15. In summation, Mr. Smith stressed that he feels that he was treated unfairly in that his grievance was not taken seriously and the union made deals outside the collective agreement to benefit Mr. Cannella rather than himself. He underlines that he never wanted to be equalized with Group 5 overtime, just Mr. Cannella, who was still classified as Group 6. He had always been equalized with Mr. Cannella before March, 1989, and thought that should have continued. Further, he wanted to have his say when the matter was discussed with the company.

16. On behalf of the union, Mr. Dias argued that Mr. Smith was trying to have more than what he was entitled to under the collective agreement. He argued that the union had given him more representation than most people and that they had argued at negotiations for the grievance even though they did not really think they could win it at arbitration and had held out on it through negotiations when the great bulk of the other seventeen hundred grievances had been resolved. They only withdrew it later when Mr. Battams convinced the bargaining committee that they could not possibly win it at arbitration. They did not feel that they should spend the members' money on something that could not be won at arbitration.

17. In the union's view, the arrangement with the company in March, 1989 was clear. In return for normally doing Group 5 work, which included having to do shift work, Mr. Cannella would participate fully in Group 5's overtime, pursuant to Article 10.05 of the collective agreement. Mr. Smith on the other hand, who had made it very clear that he wanted to remain in the mixing room, and did not want to work shifts, would be offered overtime as before, i.e. after all the Group 5's had been canvassed. In Mr. Dias' view, Mr. Smith lost nothing, and gained the formalization of the offering of Group 5 overtime, which previously had been discretionary. Rather

than discriminating against Mr. Smith, the union argues that it saved him from rotating shifts, which he did not want to do, and gave more attention to his grievance than most others.

18. The company argued that it had always followed the collective agreement and its agreements with the union.

19. Returning to the wording of section 68 and having considered all the evidence and submissions, it is necessary to decide whether the union acted in a manner that was arbitrary, discriminatory or in bad faith, when it decided not to take Mr. Smith's grievance to arbitration, and in its dealings with him leading up to that.

20. First, did the union act in an arbitrary manner? In other words, did it act in an unreasonable way without taking into account appropriate considerations, or taking into account irrelevant matters. Did it decide to drop Mr. Smith's grievance on a whim? Did it disregard important facts or the law? After considering everything that was before me and assuming everything Mr. Smith said to be true I cannot find that it did. It is true that the union had a different view of the grievance than Mr. Smith did and this is obviously the nub of the problem. The union did not think it could win the grievance at arbitration and thus the question is whether that was a reasonable thing to think or an opinion arrived at reasonably. Based on the evidence before me I find that the union considered the grievance on its merits, taking into account relevant matters and acted reasonably in coming to its decision that it would not succeed at arbitration.

21. At issue here was a difference of opinion over the meaning of "usually performing such work", in the words of Article 10.05, set out above. Mr. Smith was of the view that he performed the sealing part of the work often enough to have been included, and alternatively that he was required to be equalized with Mr. Cannella as he was classified as Group 6. The union, knowing that Ms. Chase had not assigned him sealing work from Monday to Friday during her time as supervisor did not think this was an appropriate interpretation. The union, in the person of Mr. Battams and Mr. Dias, discussed the matter with Mr. Smith on a number of occasions. I am of the view that the union had the necessary facts before it and considered them on their merits. The union's interpretation of the collective agreement is at least a reasonable one. The memo referred to by Mr. Smith does not address the narrow situation at issue here and thus does not affect the interpretation of the collective agreement. I therefore find that the union did not act arbitrarily in deciding that the grievance was unlikely to succeed at arbitration. Given that conclusion it is my view that it was not arbitrary to withdraw the grievance, given the expense of the members' money that would have been involved in proceeding. Also at issue was the potential damage to its relationship with the company when both the union and the company were clear that the terms of the March 1989 arrangement were not as Mr. Smith argued.

22. Secondly, did the union act in a discriminatory way toward Mr. Smith? Did the union single Mr. Smith out for treatment that was unfair to him? There was no specific allegation to this effect and nothing before me that would allow me to come to such a conclusion. The evidence is to the contrary, i.e. to the extent he or his grievance were singled out, it was to his benefit. His grievance was not given up at negotiations. There was no suggestion that other similar cases had been dealt with differently, or that there was any bad feeling or other sentiment that could have been the basis of a finding of discrimination. I therefore have no reason to conclude that Mr. Smith was treated unfairly, or any differently than any other member of the bargaining unit would have been in similar circumstances.

23. Finally, did the union act in bad faith in deciding not to go to arbitration or in representing Mr. Smith about his grievance? Bad faith generally implies some intention to mislead or deceive or some dishonest purpose. It can be described as pretending to do one thing while actu-

ally doing something else. The evidence does not support a finding that the union was acting in bad faith. The union supported Mr. Smith through the grievance procedure up to step two, even though the responsible officials did not agree that the grievance should even have been filed. The fact that Mr. Battams honestly told Mr. Smith that, in his view, the chances were very slim and that it was not a meritorious grievance, is not evidence of bad faith. Rather than pretending to believe in the grievance while believing otherwise, Mr. Battams communicated at an early opportunity his opinion that the chances of success were not good. Once the grievance had been filed, the union took the position that Mr. Smith should be reimbursed. This is not inconsistent with its opinion that the chances at arbitration were not high and is not itself evidence of bad faith as it was possible that something could have been gained through negotiations that could not have been gained at arbitration. It was also what Mr. Smith wanted them to do. Accordingly, I do not find that the union acted in bad faith.

24. Therefore I find that the union has not violated s. 68 of the *Labour Relations Act* in its treatment of Mr. Smith or his grievance. The company respondent is not capable of breaching s. 68 as the section is aimed at unions. The complaint is dismissed.

0388-91-M 2628181 Manitoba Ltd. carrying on business as ThunderBay Golden Nugget Saloon, Applicant v. Hospitality, Commercial and Service Employees Union, Local 73, Respondent

Sale of a Business - Reference - Respondent union applying for arbitration under section 45 of the Act - Applicant company maintaining that Minister without authority to appoint arbitrator - Minister referring two questions to the Board pursuant to section 107 of the Act - Board concluding that applicant not a successor employer nor a party to the relevant collective agreement - Board concluding that contested relationship not one of predecessor and successor employer but, rather, a landlord/tenant relationship

BEFORE: M. A. Nairn, Vice-Chair, and Board Members D. G. Wozniak and E. G. Theobald.

APPEARANCES: G. L. Firman, Stan Bardal and George Meilleur for the applicant; W. Dubinsky and Don Campbell for the respondent.

DECISION OF THE BOARD; July 30, 1991

1. This is a reference from the Minister pursuant to section 107 of the *Labour Relations Act* ("Act"). By decision dated July 23, 1991 we set out the two questions posed by the Minister and our answer to each. In summary, we concluded that the applicant was not a successor employer nor was it a party to the relevant collective agreement. We now provide our reasons.

2. The respondent trade union holds bargaining rights with respect to a group of employees of 548743 Ontario Limited, carrying on business as Red Oak Inn, Thunder Bay (the "Red Oak"). On February 24, 1991 it filed a grievance pursuant to section 45 of the Act alleging, inter alia, that the applicant herein had failed to deduct and remit dues to the trade union. It is the position of the respondent that a sale of part of a business has taken place from the Red Oak to the applicant and that the applicant is a successor employer and is bound by the collective agreement. It is the position of the applicant ("GNS" or the "Golden Nugget Saloon") that the Minister has

no authority to appoint an arbitrator under section 45 of the Act. It is the applicant's position that there has been no sale of a business from the Red Oak to the applicant, so as to make it a successor employer. The matter was referred to the Board pursuant to section 107 to determine that issue.

3. The relevant provision of the Act provides as follows:

63. (1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

4. We were referred to a number of decisions of the Board where section 63 has been interpreted and applied to various fact situations. We refer to some of the comments found in those cases that are particularly relevant to the case at hand. In *Crown Packers & Realities Ltd.*, [1988] OLRB Rep. August 752 the Board outlined the nature of the issue as follows:

38. As is usual in this type of case, although we have no difficulty in finding that the predecessor RDM has disposed of "something" to the respondents, it is more difficult to determine if the sale of that "something" constitutes a sale of a "business". Once again we note that in the past the Board has given a broad and liberal interpretation of the term "business". As the Board noted in the *Metropolitan Parking Inc.*, case:

A business is a combination of physical assets and human initiative. In a sense it is more than the sum of its parts. It is a *dynamic* activity, a "going concern", something which is "carried on". A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets.

In that particular case the Board focused on whether the purchaser had acquired a "functional economic vehicle".

39. Similarly, a "part of the business" must be a functional vehicle. The sale of "part" of a business must be more than simply sale of a part *used* in the operation of the business and must be a transfer of part of the operation itself. A "coherent and severable part" or a "discrete, cohesive portion" of the predecessor's economic organization sufficient to enable the successor to perform a discrete, definable part of the functions formerly performed by the predecessor employer must be transferred. To hold otherwise would mean that each disposition of isolated elements of the business would result in a finding under section 63 of the Act.

Most of the cases under section 55 [now section 63] involve an alleged sale of a business in its totality. Only a few consider the meaning to be ascribed to the words "part of a business". Yet those words pose much more difficulty than the term business itself. Almost anything actually traceable to the predecessor could be regarded as "part" of its business. But it could not have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept this view, would make section 55 the vehicle for extending rather than preserving bargaining rights.

(See *Vaunclair Meats Limited*, *supra*, at paragraph 25).

40. After reviewing a number of decisions the Board went on the state:

In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization, managerial or employee skills, plant, equipment, "know how" or goodwill, thereby allowing the successor to perform a definable part of the economic functions [formerly] performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor's configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement.

The Board grouped those various factors that may be required to be taken into account into two broad categories, (1) the transfer of key assets including the transfer of goodwill, and (2) the nature of the work performed.

5. In *Miracle Food Mart, Steinberg Inc.*, [1988] OLRB Rep. July 679 at paragraph 20 the Board stated:

20. In dealing with section 63 applications, the Board has traditionally accorded a liberal meaning to both the term "business" and "sells". The Board has recognized section 63 is intended to provide some stability and permanence to collective bargaining rights, to insulate those rights from the vagaries of commercial transactions where the enterprise continues, at least in part. Whether a particular commercial transaction constitutes the "sale" of a "business" or "part of a business" is a factual determination reflecting the totality of the specific circumstances. Various indicia have been noted in the jurisprudence including, the nature of the work, location, physical assets, managerial expertise, goodwill, company name, customer lists, accounts receivable, inventory, restrictive covenants, and hiatus in the operation. Moreover, it has been acknowledged that particular configurations of factors leading to a conclusion that a "sale" has occurred may differ considerably from industry to industry or between sectors of the economy. In any specific instance, the Board must determine whether what has been transferred is merely a collection of assets or an ongoing enterprise (or, at least, a distinct and severable segment of that ongoing enterprise). ...

6. See also *Steinberg Inc.*, [1989] OLRB Rep. Oct. 1066; *Canada Safeway Limited*, [1986] OLRB Rep. March 305; and *Gilham Foods*, [1984] OLRB Rep. Oct. 1423.

7. The relevant facts can be summarized as follows. The Red Oak operates a hotel on a main thoroughfare in Thunder Bay. In the past it operated part of its premises as a licensed drinking establishment, providing live entertainment on occasion, and a dance floor. More recently, for economic reasons, any entertainment was limited to providing taped music accompanied by music videos. The dance floor remained. The premises operated under the name of "Dick Turpin's" and subsequently under the name "Milligan's". In either case the premises were operated by the hotel along with the other aspects of its business, that is, room rentals, dining and banquet facilities and a bar. In July 1989 Milligan's was closed. It was not economically viable evidenced (among other things) for example by its last Saturday night of operation when there were more staff than customers present. Having closed, the hotel used the space for storage of various hotel furnishings and other materials.

8. In about the late spring of 1990, Stan Bardal, the principal of the Golden Nugget Saloon was in Thunder Bay. He was looking for a location to open another Golden Nugget Saloon. The applicant had successfully operated in Winnipeg providing a licensed drinking establishment along

the theme of a country and western saloon. It serves food and provides a variety of ongoing entertainment including such things as live country and western musical performances, "indoor rodeos", various contests, and dancing. Having contacted a real estate agent in Thunder Bay Mr. Bardal was first shown two other properties which were unsuitable because of their undesirable location or limited parking facilities. Mr. Bardal happened to be staying at the Red Oak and learned of the space that had been Milligan's from hotel staff. He viewed the space, became interested in the location, and negotiations began between Mr. Bardal and the hotel's head office for lease arrangements. A lease was subsequently entered into in November 1990 and in late January 1991, the Golden Nugget Saloon opened for business. By that time there had been a hiatus in the use of the space for some eighteen months.

9. While the lease provided for the use of certain furnishings from Milligans by the Golden Nugget Saloon these furnishings were returned to the Red Oak prior to the opening of the saloon. A built-in beer cooler and some sink units that we are satisfied would be considered fixtures were leased with the premises. The actual space leased by the Golden Nugget Saloon includes the space formerly used by Milligan's and certain additional adjacent space formerly used for other purposes by the hotel. Extensive renovations totally between \$400,000 - \$500,000 were completed by the Golden Nugget Saloon including upgrading to meet fire standards, raising of the ceiling, the closing of certain access into the hotel and the decoration and furnishing of the space. The public entranceways remained in the same location as before and access from the hotel directly into the Golden Nugget Saloon continues to exist.

10. Apart from some discussions with respect to the availability of the additional adjacent space, the local management of the hotel did not participate in lease negotiations nor were they involved in the renovations. Although Milligan's had a liquor license allowing it to serve all types of alcoholic beverages that license was not transferred to the Golden Nugget Saloon. The Golden Nugget Saloon applied for and received its own liquor license. Similarly, no inventory was transferred from the Red Oak to the Golden Nugget Saloon.

11. Although the Golden Nugget Saloon seeks to attract a different clientele to its establishment and Mr. Bardal referred to it as an entertainment centre, we were satisfied that the essential nature of the business that Milligan's conducted has not changed (see *Doyles Tavern* [1984] OLRB Rep. Dec. 1700 and the cases cited therein). However in this case, having regard to the totality of factors, we were not satisfied that what had occurred constituted a sale of a part of the predecessor business. At the time of its closure, Milligan's was not a "going concern". In addition, there was a hiatus of some eighteen months in any economic activity in the location. Described another way, it cannot be said that goodwill (if any) that attached to Milligan's was transferred to the Golden Nugget Saloon. The key asset for the operation of a licensed drinking establishment, that is its liquor license, was not transferred. Nor did any inventory, expertise, or physical assets transfer.

12. We were satisfied that the relationship between the Red Oak and the Golden Nugget Saloon was not one of a predecessor and successor employer but is in substance, a landlord/tenant relationship. Mr. Bardal was not seeking to acquire an existing business, but to expand his own very successful enterprise. In this regard we refer to *Master's Brew Pub and Brasserie*, [1988] OLRB Rep. August 827.

13. As stated in *Grand Valley Ready Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663:

20. The exercise becomes more complicated where, as in this case, the alleged successor has carried on a parallel business. Where the alleged successor has carried on a parallel business the result of the transaction may as easily be an expansion or alteration of his business as the trans-

fer of the alleged predecessor's business. An employment opportunity which flows from an expansion or alteration of the business carried on by the alleged successor prior to the section 55 [now section 63] transaction does not trigger the operation of the section. The union's bargaining rights attach to the predecessor's business and their preservation is contingent upon a transfer and continuation of that business.

(And see *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193).

14. For the forgoing reasons, we concluded in our decision dated July 23, 1991 that:

1. 2628181 Manitoba Ltd. carrying on business as ThunderBay Golden Nugget Saloon is not a successor employer to 548743 Ontario Limited, carrying on business as Red Oak Inn, Thunder Bay; and

2. 2628181 Manitoba Ltd. carrying on business as ThunderBay Golden Nugget Saloon is not a party to the collective agreement between 548743 Ontario Limited, carrying on business as Red Oak Inn, Thunder Bay and the respondent trade union herein.

2438-90-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Toyota Canada Inc., Respondent

Bargaining Unit - Certification - Pre-Hearing Vote - Employer operating head office, warehouses and vehicle distribution centre out of five separate locations - One location temporary - No interchange of employees between the locations - Union seeking site specific bargaining unit including head office and adjacent warehouse - Employer proposing municipal unit - Board finding union's proposed unit appropriate and directing that ballots cast by employees in that unit be counted

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

APPEARANCES: *Craig Grant* and *Hassan Yussuff* for the applicant; *W. S. Cook* and *Peter G. Bond* for the respondent.

DECISION OF: **M. A. NAIRN, VICE-CHAIR, AND BOARD MEMBER C. MCDONALD;** July 15, 1991

1. This is an application for certification wherein the applicant requested that a pre-hearing representation vote be taken. By decision of the Board dated January 10, 1991, a vote was ordered and subsequently taken. The ballot box was sealed and the ballots not counted pending determination of a number of issues in dispute between the parties. A hearing was convened before this panel to deal with those outstanding matters.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* (the "Act").

3. The applicant challenged a number of individuals on the list of employees submitted by the employer. The parties were however able to resolve a number of those challenges at the outset

of the hearing. The parties are agreed that K. Boodoo, S. Hegazy, W. Richards, P. Ryan, N. Scanga, and M. Sutton are employees properly included in the bargaining unit. The parties are further agreed that J. Defede, K. Gosien, M. Houston, B. Pardasie, and J. Skinner were not properly on the list of employees and are excluded from the bargaining unit.

4. The applicant withdrew its challenge that N. Holder and A. Rains were not employees of the respondent. However it maintained its position with respect to the bargaining unit description issue outlined below in paragraph 7, that these two individuals would otherwise be excluded from the bargaining unit.

5. The parties are agreed that Diane Kroontze falls within the office and sales staff exclusion from the bargaining unit and therefore any ballot cast by Ms. Kroontze is not to be counted.

6. The parties remained in dispute with respect to whether Mr. S. Senter was an employee within the bargaining unit. The respondent takes the position that Mr. Senter shares a community of interest with the employees in the bargaining unit applied for. The applicant takes the position that Mr. Senter shares a community of interest with the employees that fall within the office and sales staff exclusion from the bargaining unit.

7. The other issue in dispute was the geographic scope of the bargaining unit description. As set out in the Board's decision of January 10, 1991, it is the position of the applicant that the bargaining unit should consist of employees situate at the location identified as 1291 Bellamy Road North/830 Progress Boulevard ("Bellamy/Progress"). The respondent takes the position that the bargaining unit should be described as including those employees within the Municipality of Metropolitan Toronto. The respondent operates at three other locations within that geographic area. Subject to the geographic scope of that bargaining unit, the parties are agreed that all employees of the respondent, save and except supervisors, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.

8. The panel heard the parties' evidence and submissions with respect to these outstanding issues. The bargaining unit applied for by the applicant comprises two street addresses; the Bellamy Road North ("Bellamy") address is used in referring to the respondent's head office. The Progress Boulevard ("Progress") address is the address used to refer to the respondent's parts distribution warehouse. Both these addresses are physically situate together on the corner of Bellamy Road North and Progress Boulevard in the City of Scarborough.

9. The Bellamy location houses the national head office of Toyota Canada Inc. It provides centralized financial/accounting and administrative services for the respondent. All parts and vehicles sold and/or distributed by the respondent are ordered from the head office location. Operational and administrative policies, including Human Resource policies are determined through the head office.

10. Adjacent to the head office is the parts warehouse situate on Progress Boulevard. It houses vehicle parts for shipment to dealers in Ontario and those east of Ontario. It houses 'slow moving' parts for shipment across Canada and receives and distributes fork-lift parts across the country. The operation involves receiving, storing, picking and packing of parts based on dealers' orders and shipment to them. At Progress there is also a repair and testing function. Broken parts shipped into the warehouse from dealers are handled and shipped out to repair centers. Upon their return they are shelved and/or shipped to dealers on an order basis. This would include, for example, starter motors or alternators.

11. The three other locations which the respondent seeks to include in the bargaining unit description are 411 Nugget Avenue, 410 Passmore Avenue and what has been referred to as the Nashdene Yard. All of these locations are situated within the City of Scarborough.
12. The employees at the Nugget Ave. location were moved there in August of 1990. Certain space at the Bellamy/Progress location is in the process of being converted to office and technical space. That construction is due to finish in June of 1991. During the period of construction (a period of approximately ten months) the respondent leased space at Nugget Avenue in order to continue the operations of the employees involved. Upon completion of the construction these individuals will return to the Bellamy/Progress location.
13. At the Passmore location there is only one employee. That person is classified as a warehouseperson. The work at Passmore was relocated approximately two years ago from Bellamy due to space problems. It comprises the industrial equipment division of the respondent and involves the shipping and receiving of fork-lift trucks. The warehouseperson picks up parts on a fairly regular basis from the warehouse at Progress.
14. The Nashdene yard is the respondent's vehicle distribution location. Vehicles that have been ordered are shipped to Nashdene from where they will be shipped to car dealers within Ontario. The respondent maintains a facility not unlike a body shop on site where three painter/bodymen and one sander are employed to repair any damage done to the vehicles en route from Vancouver to Toronto. In addition there is one individual employed as a yardman who is responsible for moving the vehicles off the trains and in the yard. These individuals report to the Vehicle Warehouse Operations Manager who is located at Nashdene.
15. All of these locations are connected by way of telephone and computer system. There is no evidence of any interchange of employees between the locations.
16. Mr. Senter is employed in the classification Maintenanceperson/Administration. He handles minor repairs at Bellamy although occasionally he is called upon to do small repairs in the warehouse at Progress Boulevard. He also inspects company driven cars for damage, maintains records with respect to these vehicles and he would, for example, change the license plates as required. The respondent acknowledged that Mr. Senter generally works in the office performing functions such as moving desks or stationery and performing small maintenance tasks.
17. In determining the appropriate bargaining unit in this case we have taken into account the remarks in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 at paragraph 17:

... what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it

wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

18. Further at paragraph 23 of that decision the Board summarizes the nature of the issue at hand:

... Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

19. In dealing with the more specific question of the geographic scope of the bargaining unit and the considerations which apply, we refer to some earlier comments of the Board in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250:

8. Although the Board must be sensitive to the impact of its bargaining unit determinations upon the ability of trade union's [sic] to organize, there are other factors which must also be taken into account. The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case. ...

9. Nowhere is the balancing of the statutory objectives more evident than in the Board's normal practice of circumscribing the geographic scope of bargaining rights by reference to the municipal boundary within which the employer operates. Where there is only one location within a municipality the Board will define the unit in terms of all employees within the municipality. Under a regime of municipal-wide certification bargaining rights follow an expansion or relocation of the business within the municipality; but not beyond. The freedom of choice of employees to make the initial selection of a bargaining agent at future sites within the municipality is sacrificed in favour of the stability of the bargaining rights conferred by the certificate. However, these rights do not extent [sic] beyond the municipality in deference to the right of employees at new locations outside the municipality to select a bargaining agent of their choice. The use of the municipal boundary represents an attempt by the Board to strike a rough balance between stable bargaining structures and individual freedom of choice.

10. Where the employer operates at two or more locations within a municipality at the time of certification a number of other considerations come to the fore which must be taken into account by the Board. Because the operations are in existence the Board is able to make a first hand assessment of the community of interest between the employees at the two locations. ...

11. ... There are other important considerations which enter the picture as well where the employer operates from two or more locations within the same municipality. Where it is raised as an issue the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to bargain collectively. This latter consideration requires the Board to take into account the pattern or organization in the case before it and to balance the pattern of organization against the disruptive effects of excessive fragmentation. The potential for fragmentation takes on an added weight where the Tribunal lacks the authority to restructure existing bargaining units at some future date. The nature of the deliberations which are undertaken by the Board in determining the appropriate bargaining unit where

the employer operates from two or more locations within the municipality are summarized in the following passage from the Board's *Ponderosa Steakhouse* decision:

"The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "'bargaining unit' means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them".

This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, *supra*."

...

14. ... The balance which has been struck by the Board in the circumstances of these cases has been aptly described in the following passage from the *Canada Trustco* decision, *supra*,

"In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all."

18. ... Viability for purposes of collective bargaining, on an application of community of interest principles and a consideration of the effect of fragmentation, remains a prerequisite for a finding of appropriateness. However, the Board recognizes that there may be more than one appropriate unit in any given case. Where there is more than one appropriate unit the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively...

20. Both parties also referred the panel to the Board's decision in *Usarco Limited*, [1967] OLRB Rep. Sept. 526 which sets out the factors that the Board generally considers in determining whether a community of interest exists between employees.

21. The difficulties that are presented in assessing the appropriateness of a bargaining unit configuration where an employer operates out of more than one location within a municipality are highlighted by comparing two Board decisions. In *Magna International Inc.* [1981] OLRB Rep. Sept. 1260 the Board found three separate bargaining units to be appropriate in circumstances where the employer operated three plants within a municipality, while in *Mobile Chemical Canada, Ltd.*, [1987] OLRB Rep. Apr. 559 the Board found one bargaining unit covering two plants to be appropriate in circumstances there.

22. In *Mobile Chemical*, *supra.*, the Board refers to and comments on *Magna International*, *supra.*, as follows:

12. ... Where an employer carries on business at more than one plant within a municipality, the Board's general practice is to describe separate bargaining units for employees at each plant. However, the Board will depart from that general practice if the operations are integrated and the employees share a sufficient community of interest: *Faber-Castell Canada Limited*, [1986] OLRB Rep. Apr. 449. In *Magna International Inc.*, [1981] OLRB Rep. Sept. 1260, the then Chairman of the Board wrote, in part, as follows concerning the approach which the Board has generally adopted in such cases:

12. Section 6(1) of *The Labour Relations Act* charges the Board with the responsibility of determining "the unit of employees that is appropriate for collective bargaining." The Act, however, does not furnish precise criteria of "appropriateness." Consequently, the Board has developed certain broad policy guidelines which attempt to balance the right of self-organization guaranteed in section 3 of the Act with the requirements of a viable collective bargaining relationship. There is no lack of cases where the Board has had to choose between single plant or location bargaining units and multi plant or location bargaining units in trying to strike this balance. Generally, unions will advocate the former (since, although they may be more difficult to service, they are generally easier to organize) while employers will generally advocate the latter (since they are generally more difficult to organize but also because larger bargaining units present the employer with a more easily administered and potentially less disruptive collective bargaining relationship)...

13. In determining the appropriateness of bargaining units which include employees at more than one location the Board has outlined certain fundamental criteria as in *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526. (For an excellent and recent review of this see *K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250). The criteria are: (1) community of interest of the employees; (2) centralization of managerial authority; (3) economic factors; and (4) source of work. The first criterion has been subdivided further to include: the nature of work performed, the conditions of employment, the skills of employees, administration, geographic circumstances, and functional coherence and interdependence. It has been pointed out on numerous occasions that the factors are obviously interdependent and that all factors do not take on the same weight in any given case. Moreover, they must be considered in light of the purpose of the Act which is to facilitate employee access to collective bargaining. The Board has been careful to avoid an overly technical or rational process to collective bargaining structures in order not to frustrate employee wishes...

The Board then concludes on the facts in *Mobile Chemical* that:

14. Having regard to the criteria and labour relations policy considerations set forth in that jurisprudence, we have concluded that there is a substantial community of interest among the employees at the aforementioned two plants, and that to separate the employees at the Plastics plant from the employees at the Films plant, as requested by the applicant, would result in undue fragmentation of the respondent's work force, thereby creating a situation which would not be conducive to viable collective bargaining. In reaching that conclusion, we have taken into consideration a number of factors. As indicated above, employees at both plants use similar skills to perform similar work in plants only a few hundred metres apart, which both convert plastic resin pellets into plastic packaging material. An identical wage structure applies to employees at both plants and they all receive the same benefits. Other conditions of employment, such as the aforementioned mix of seven-day rotating operations and five-day rotating operations, are also common to both plants. Although each plant has its own manager and supervisors, there is a single personnel department which approves all hires, discharges, disciplinary actions, promotions, demotions, and appraisals. The fact that job openings in each of the two plants are posted in both plants further evidences their functional coherence and interdependence. The granting of a bargaining unit confined to employees at the Plastics plant, with the obvious potential for a further (production) bargaining unit at the Films plant, could hinder transfers, postings, and promotions between the two locations. It might also give rise to indus-

trial relations problems in the event that the respondent wished to continue to permit maintenance employees from the Plastics plant to go to the Films plant to use various equipment at that plant. The use of the aforementioned group of temporary employees to perform specific tasks at the two plants from time to time might also be hampered by such a bargaining unit configuration. As indicated above, in exercising its power under section 6(1) of the Act to determine the unit of employees that is appropriate for collective bargaining, the Board considers the effect of a broader based unit upon employee access to collective bargaining in the industry to which the application pertains: see, for example, *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. In the instant case, the applicant has confined its organizational activities to employees in the Plastics plant, and has not attempted to organize the Films plant. However, having regard to all of the circumstances, including the extent to which the chemical industry has already been organized in Ontario, the Board does not consider that the larger unit proposed by the respondent in the circumstances of this case would significantly impede employee access to collective bargaining. In reaching this conclusion, we have balanced the interests of those employees who have signified their desire to bargain collectively and be represented by the applicant, the substantial community of interest shared by those employees and the employees of the respondent at its Films plant, and the potential for undue fragmentation which would be created by confining the bargaining unit to the Plastics plant. Our balancing of all of those interests in the circumstances of the present case has led us to conclude that the Plastics plant should not comprise a bargaining unit separate from the Films plant.

23. In the instant case there is little doubt that a bargaining unit described to include those employees at Bellamy/Progress is appropriate. What then argues for a more comprehensive unit? Certainly a bargaining unit encompassing all locations within the municipality may also be appropriate. What can be said when reviewing those factors discussed both in *Magna International, supra.*, and *Mobile Chemical, supra.* in light of the comments in *Hospital for Sick Children, supra.*? We have insufficient evidence to draw useful conclusions with respect to the centralization of managerial authority although employees at each location report to different local supervision. A more comprehensive bargaining unit would clearly be administratively more convenient for the employer. We are not persuaded that a multiplicity of bargaining units would necessarily have adverse consequences for future bargaining. The sources of the work between Bellamy/Progress, Passmore, and Nashdene are distinct. The nature of the warehousing and distribution work performed by employees at the various locations is similar, although certain of the other functions are not, for example, the “body shop” at Nashdene. To that same extent the skills of the employees vary. The terms of employment and working conditions are similar at all locations. The employer’s structure, at least in terms of human resource policy development and administration is centralized.

24. Obviously there is a certain level of coherence between the locations simply given the fact that the functions being performed are for the enhancement of the respondent’s overall operation. However, the Nashdene and Passmore locations are not functionally integrated with the parts warehouse except to the extent that the warehouseperson at Passmore will pick up parts from Bellamy/Progress. There is no evidence of any interchange of employees between any of the locations. Unlike the employees in *Mobile Chemical, supra.*, and similarly to the employees at *Magna International, supra.*, employees here do not appear to transfer between jobs at the various locations.

25. We are not satisfied that the scope of the bargaining unit ought to include employees at the Nashdene and Passmore locations. The applicant does not seek to represent these employees nor does it appear that by excluding them from the bargaining unit will the employer be presented with serious labour relations problems. The thrust of the respondent’s submission was directed at its own administrative convenience. From a labour relations point of view while it may well be more convenient to deal with employees at these various locations within one larger bargaining unit, that is not, as was pointed out in *Hospital for Sick Children, supra.*, determinative of the issue

of the appropriate bargaining unit. On balance we are satisfied that the Nashdene and Passmore locations are sufficiently distinct particularly in light of no evidence of any interchange of employees, to conclude that the scope of the bargaining unit proposed by the applicant (subject further to what we will say with respect to the employees at Nugget Ave.) is appropriate.

26. The facts applying to the Nugget Ave. location are slightly different. However, for reasons similar to those with respect to the Passmore and Nashdene locations, we are not persuaded that the scope of the bargaining unit ought to include reference to it. It is a temporary location. Upon the return of the employees to the Bellamy/Progress location, they will fall within the bargaining unit proposed by the applicant, subject to any other exclusions. If the employees were not to return to Bellamy/Progress, based on the evidence before us, there appears to be no greater community of interest between these employees and the employees at Bellamy/Progress than with employees at the other locations and Bellamy/Progress.

27. Having regard to the partial agreement of the parties and to the findings of the Board with respect to the appropriate bargaining unit we find that:

all employees of the respondent at 1291 Bellamy Road North/830 Progress Boulevard in the City of Scarborough, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period,

constitute a unit of employees of the respondent appropriate for collective bargaining.

28. Based on the limited evidence we received with respect to the work performed by Mr. Senter, we find that he more properly falls within the office and sales staff exclusion from the bargaining unit. His daily functions are more closely associated with the operation of the office. While he is employed in the classification of maintenanceperson, his title indicates he reports to the Administrative Services side of the respondent's operation.

29. Further to the Board's decision of April 24, 1991 the panel has been advised by the parties that there is no objection to the sufficiency of the Form 9 filed by the applicant.

30. The Board is satisfied that not less than thirty-five percent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

31. Pursuant to section 9(4) of the Act the ballots cast by employees in the bargaining unit on the application date may now be counted.

32. This matter is referred to the Manager of Field Services in order that arrangements can be made with the parties for the counting of the ballots.

DECISION OF BOARD MEMBER J.A. RONSON; July 15, 1991

1. Board Member Ronson dissents from this decision with reasons to follow.

2712-90-M York University Staff Association, Applicant v. York University, Respondent

Employee Reference - Evidence - Practice and Procedure - Board earlier appointing Officer to inquire into named person's duties and responsibilities - Employer agreeing to commence examinations while reserving its right to raise issue of estoppel - Board finding it preferable to determine any estoppel issue directly and as preliminary matter - Employer directed to advise Board in writing whether it intends to pursue estoppel argument and, if so, to provide full particulars - If so advised, Board to conduct hearing into estoppel issue and union directed to file fully particularized statement of facts in reply - Except with leave of the Board, neither party to be permitted to adduce evidence of any fact not particularized

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

DECISION OF THE BOARD; July 5, 1991

1. This is an application under section 106(2) of the *Labour Relations Act*. By decision dated March 26, 1991, the Board wrote as follows:

7. In this case, the dispute between the parties is whether or not the persons named in paragraph 1, above, are employees in the bargaining unit covered by the collective agreement between them. However, it is also evident that the root of the dispute with the respect to at least *some* of those persons is whether or not they exercise managerial functions within the meaning of section 1(3)(b) of the Act.
8. Consequently, and notwithstanding the misgivings we have about the utility of proceeding with this application, we find it appropriate to authorize a Labour Relations Officer, to be designated by the Board's Manager of Field Services, to inquire into and report to the Board with respect to the duties and responsibilities of the persons named in paragraph 1, above. This authorization is restricted to those persons. The applicant's January 16, 1991 letter suggests that it may seek to add others to this application. In our view, because of the number of people already named in the application, it would not be appropriate to permit the applicant to do so. Accordingly, if either party wishes a determination by the Board under section 106(2) of the Act with respect to persons other than those named herein, a separate application must be made. Further, our decision to proceed with this matter is without prejudice to the respondent's right to raise, at a hearing before the Board, the estoppel issue raised in its March 5, 1991 letter, or an argument that some of the persons are otherwise not properly the subject of this application.
9. If either party considers that it would be appropriate for the Board to deal with the estoppel issue or with an argument that some of the persons herein are not properly part of this application, prior to an Officer beginning an inquiry as authorized herein, that party should so request in writing, together with full particulars of the basis for its request.

2. Although some three months have passed, it appears that a formal inquiry by the Officers designated to conduct it has not yet begun. By letter from counsel dated June 10, 1991, the respondent wrote to the Board as follows:

At a meeting held on June 6, 1991 with representatives of the University, the Union and the two Labour Relations Officers assigned to this case, it was agreed that examinations into duties and responsibilities of the disputed positions would commence and we understand that Ms. Bucik will be contacting the parties to schedule same in the near future.

We wish to advise you that the University agreed with the foregoing on the express condition

that it was reserving its right to argue the estoppel issue and to request the Board to hold a hearing into that issue, if that should be necessary.

3. By letter from counsel dated June 14, 1991, the applicant responded as follows:

We have received a copy of Ms. Bisset's letter to you dated June 10, 1991. We understand that the Respondent wishes to begin the examinations, but wants to reserve its right to later make its estoppel argument.

We are anxious to begin the examinations as well. However, it appears that these examinations will be lengthy, given the number of persons to be examined. If the Respondent later makes its estoppel argument, and is successful, the parties will have wasted a lot of time and money. This is a result that should be avoided, if at all possible. In our submission, it makes far more sense to have a determination of the Respondent's estoppel argument (which really is in the nature of a preliminary objection) before the examinations begin. We note the Board's decision dated March 26, 1991, which provided:

"If either party considers that it would be appropriate for the Board to deal with the estoppel issue or with an argument that some of the persons herein are not properly part of this application, prior to an Officer beginning an inquiry as authorized herein, that party should so request in writing, together with full particulars of the basis for its request."

In accordance with the Board's direction, we hereby request that the Board deal with the estoppel argument prior to the Officer beginning her inquiry.

4. In subsequent correspondence, the respondent objected to the Board proceeding to deal with its estoppel argument at this stage of the application on the basis that it should be up to the respondent to decide if and when this argument is to be made, that the estoppel argument may never in fact arise and to argue it as a preliminary matter could result in unnecessary expenditure of time and resources, and that the estoppel argument is such that hearing it could be a lengthy process.

5. The applicant, on the other hand, submits that the Board's authorization of a Labour Relations Officer to inquire into and report to it with respect to the duties and responsibilities of the persons whose "employee" status is in dispute herein does not extend to the factual basis for any estoppel argument, that it is for the Board and not a party to determine the manner in which a matter before it is to proceed, and that the Board should hear the evidence relating to any estoppel issue directly.

6. We appreciate that speed can be a relative thing. However, there appears to have been a distinct lack of speed in this case, regardless of one's perspective and despite the expressions of interest in it. We would have thought that the first question to which the parties would have addressed themselves would have been whether there was a need to have any preliminary matters dealt with by the Board, particularly since they were specifically invited by the Board to do so.

7. Nevertheless, in our view, it is preferable for the Board to hear and determine any estoppel issue both directly and as a preliminary matter. It seems to us that it is more likely than not that it would be more expeditious to proceed in that manner than by having it be a part of the Officer's duties and responsibilities inquiry and report to the Board.

8. Accordingly, the Board finds it appropriate to direct the respondent to advise the Board within twenty-one (21) days of the date hereof, in writing, whether it intends to pursue an estoppel argument in this matter, and, if it does, to provide full particulars thereof, together with its estimate of the number of hearing days required to deal with the issue. If the respondent fails to do so,

it will be deemed to have abandoned any estoppel argument with respect to this application and will not be permitted to raise it thereafter. If the respondent advises the Board that it does wish to pursue an estoppel argument, the applicant is also to file with the Board a fully particularized statement of the facts upon which it intends to rely with respect to the estoppel issue(s) identified by the respondent, and the Registrar shall schedule a hearing for the purpose of hearing the evidence and representations of the parties with respect to the estoppel issue(s). Except with leave of the Board, neither party will be permitted to adduce evidence with respect to any estoppel argument of any fact not disclosed in its statement of particulars in that respect.

9. The Board also finds it appropriate, in the circumstances, to direct the parties to identify within twenty-one (21) days of the date hereof, in writing and with full particulars, any other preliminary matter or issue which they intend to raise, together with their estimates of the number of hearing days it will take to deal with each. If any such other preliminary matter is raised in accordance with this direction, the Registrar will also schedule it for hearing. Any preliminary matter which is not raised in accordance with this direction will be deemed to have been abandoned and will not be subsequently entertained by the Board.

COURT PROCEEDINGS

1171-89-FC; 1545-89-R (Court File No. 1007/91) Knob Hill Farms Limited, Applicant v. The United Food & Commercial Workers Union, Local 206, The Crown in right of Ontario (Minister of Labour), the Ontario Labour Relations Board and Susan Caterina, Respondents

First Contract Arbitration - Judicial Review - Stay - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining, and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to section 40a(22) of the Act - Employer asking court to stay Board decision pending disposition of judicial review application - Court finding no strong *prima facie* case - Stay application dismissed

Board decision reported at [1991] OLRB Rep. April 521.

Ontario Court of Justice, Mandel J., July 2, 1991.

MANDEL J. (Orally): In May of 1986, Local 206 applied to the Ontario Labour Relations Board to be certified as the bargaining agent of the employees of Knob Hill Farms Limited at Oshawa, Ontario. It was so certified on December the 22nd, 1987. Since then, there has been a number of hearings, rehearings, applications to the court and manoeuvrings. There is, as yet, not a collective agreement in existence.

The present application before me is as a result of an application by Knob Hill for a Judicial Review of, first, the decision of the Minister dated November the 17, 1988 to appoint a conciliation

officer pursuant to the request of Local 206; secondly, the decision of the Minister not to appoint a conciliation board, dated July 28th, 1989; and lastly, the decision of the Board, dated April the 9th, 1991, wherein it dismissed the application of Susan Caterina for a declaration that Local 206 no longer represents the employees in the bargaining unit, and wherein it directed the settlement of a first collective agreement by arbitration upon the application of Local 206.

Normally, the Judicial Review is heard by the Divisional Court. However, s.6(2) of the *Judicial Review Procedures Act* states that an application for judicial review may be made to the High Court with leave of a judge thereof, which may be granted at the hearing of the application where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

In the alternative, Knob Hill asks that the foregoing three decisions be stayed until the final determination by the Divisional Court.

During submissions, counsel for Knob Hill, in the proper and commendable tradition of the Bar, stated forthrightly that of the two alternative remedies requested, the matter of stay should be dealt with first, not only because the criteria that must be met to obtain a stay to a large extent overlaps the criteria involved in determining the s.6(2) application, but also because if the stay is granted, there would no longer be an urgency.

In addition, being aware that to some degree the merits of the case need be addressed, whether the part of the test for a stay be a serious issue between the parties, or whether it be a strong *prima facie* case, of which I shall have no more say hereafter, counsel stated that if I came to the conclusion that the s.6(2) application need not then be addressed, and that in such circumstances, the s.6(2) application is withdrawn.

The facts in the matter are not in dispute. The chronology, as agreed to by all counsel, is as follows:

- May the 23rd, 1986, Local 206 applied to the Board for certification.
- August the 8th, 1986, there was a merger between what was termed during submissions Local 175 and Local 206.
- November the 1st, 1986 was the effective date of the merger.
- December the 22nd, 1987, the Board certified Local 206 as the bargaining agent.
- January the 4th, 1988, Knob Hill requested the Board to reconsider its decision. On such application, the question of merger was not brought up nor made a ground for such consideration.
- January the 15th, 1988, notice to bargain was issued.
- February the 11th, 1988, the International Union, as well as Local 175, recognized that the merger was effective as of November the 1st, 1986.
- March the 2nd, 1988, the Board rejected Knob Hill's application for reconsideration.
- March the 29th, 1988, Knob Hill launched an application for Judicial Review of the Board's decision.
- May the 15th, 1988, Knob Hill applied for a stay of the Board's certification order.

- May the 30th, 1988, the stay application was refused.
- April the 7th, 1988, the Board in the *Viletta China* case recognized Local 175 as the successor to Local 206.
- April the 26th, 1988, Local 175 made a request for a conciliation in respect of Knob Hill Unit.
- August the 18th, 1988, the Board issued an opinion in respect of the reference by the Minister as to whether Local 175 could have conciliation.
- August the 25th, 1988, Local 206 made a request for conciliation.
- August the 26th, 1988, Local 206 asked the Board to reconsider its decision certifying it as the bargaining agent and asked that its name be substituted by that of Local 175. That request was joined in subsequently by Local 175 and the International Union.
- September the 15th, 1988, the Minister issued his decision refusing Local 175's request for conciliation.
- November the 8th, 1988, the Board issued an opinion in respect of the reference by the Minister as to whether Local 206 could be granted conciliation. Knob Hill had made representations to the Board in respect of such opinion.
- November the 15th, 1988, Knob Hill launched its second request for reconsideration of the Board's order of certification of Local 206. One of the grounds in this application was the matter of merger.
- November the 17th, 1988, the Minister appointed a conciliation officer, granting the request by Local 206 for conciliation. It is this appointment that Knob Hill has now applied to have judicially reviewed some two and one-half years later.
- February the 9th, 1989, the Board issued detailed reasons for its opinion of November the 8th, 1988 to the Minister that Local 206 can have conciliation.
- June the 9th, 1989, the Divisional Court dismissed Knob Hill's application for judicial review of the Board's decision to certify Local 206 which was launched by Knob Hill on March 29th, 1988.
- July the 28th, 1989, the Minister issued a notice informing the parties that he did not consider it advisable to appoint a conciliation board. It is also this decision that Knob Hill has now applied to have judicially reviewed.
- August the 4th, 1989, Local 206 applied to the Board for an order directing the settlement of a first collective agreement by arbitration.
- August the 21st, 1989, the Board adjourned the first contract application pending the outcome of the outstanding reconsideration application of, first, Knob Hill, that is to say the second consideration which was launched on November the 15th, 1988, as secondly, Local 206, which was launched.
- August the 26th, 1988, in which Local 175 and the International Union both joined subsequently.
- September the 22nd, 1989, the termination application was filed by Susan Caterina.

— October the 26th, 1989, the Board adjourned the termination application so that it would be brought on at the same time as the first contract application.

— January the 31st, 1990, the Board, referred to in submissions as the Petryshen panel, dismissed Knob Hill's second request for reconsideration, and as a result, Local 206, Local 175 and the International Union withdrew their request for reconsideration.

During the course of their reasons, the Board stated (see paragraph 9, tab 11 of the motion record of Local 206):

"The position of Knob Hill can be summarized as follows. It appears that part of its request for reconsideration was initially based on the proposition that Local 206 ceased to exist. In a written submission prior to the hearing in early November 1989, and at that hearing, Knob Hill advised the Board that it does not dispute the existence of Local 206 in this proceeding."

That is to say, the proceeding for a reconsideration as to whether Local 206 should be the bargaining agent in question.

— February the 16th, 1990, the application of Susan Caterina to terminate Local 206 bargaining rights and the application of Local 206 for the settlement of a first collective agreement by arbitration came before the Board. Susan Caterina, supported by Knob Hill, requested that her application be dealt with first and Local 206 that its application be dealt with first, the reason being because of s. 40a(22) of the *Labour Relations Act*. Such section reads:

"(22) Notwithstanding subsection (2), where an application under subsection (1) has been filed with the Board --"

I digress here to state that such an application is an application for a first contract arbitration.

-- and a final decision has not been issued by it and there has also been filed with the Board ...

(a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit ...

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered".

The Board then ruled:

"11. Upon hearing the representations of the parties with respect to how it should proceed with these two applications, the Board unanimously ruled (orally) that it would hear them together and then make the requisite determination under section 40a(22). The Board was satisfied that that determination could not be made in this case in the absence of the evidence and representation of the parties with respect to applications."

Oral evidence was then heard in respect of both applications together.

— October the 22nd, 1990, the Court of Appeal refused leave to appeal the decision of the Divisional Court dated June the 9th, 1989, which dismissed the application of Knob Hill in respect of the certification of Local 206 and which was originally launched on March the 29th, 1988.

— April the 9th, 1991, the decision of the Board in respect of the first contract and the termination application. In the course of its reasons, the Board found as follows, as set forth in paragraphs 49, 50, 51 and 52 of Exhibit 19 to the affidavit of Howard F. Wood filed by Knob Hill in these proceedings:

“49. We are satisfied that the process of collective bargaining between the parties has been unsuccessful because of Knob Hill’s refusal to recognize the bargaining authority of Local 206, the uncompromising positions adopted in bargaining by Knob Hill without reasonable justification, and the failure of Knob Hill to make reasonable or expeditious effort to conclude a collective agreement.

50. We are satisfied that Knob Hill’s conduct, and its approach to bargaining, were designed to not only defeat collective bargaining, but also to communicate to bargaining unit employees a very simple message: unionization has not and will not bring you anything. That this message was received by the employees is demonstrated by the evidence of Susan Caterina, the applicant in the termination proceeding, who testified before the Board that ‘I just know the union hasn’t done anything for us’ and who, in preparing to bring her application, circulated a letter soliciting support, which letter contains the following statement:

I don’t believe that the Union has done anything for us since it got in and I don’t want to start paying union dues each month for the same wages and benefits we would have received with or without a union.

51. The sections of the *Labour Relations Act* which provide for the termination of a trade union’s bargaining rights contemplate that the trade union which has been certified by the Board will have some time (a minimum of six months in the construction industry and one year outside of the construction industry) to prove itself to the employees it represents. In our view, Local 206 has not had that opportunity in its relations with the employees of Knob Hill. While Local 206 has itself contributed to that situation, its primary cause is the product of Knob Hill. In the circumstances, including the certification of Local 206 pursuant to section 8 of the Act, Knob Hill’s failure to comply with the directions of the Petryshen panel, the dates of the two applications herein, and the conduct of Knob Hill and the effect of that conduct, we find it appropriate, in the exercise of our discretion under section 40a(22) of the Act to consider the first contract application herein first.

52. In the circumstances herein, and having regard to our finding as aforesaid, the Board finds it appropriate to direct that a first contract collective agreement between Knob Hill Farms Limited and the United Food and Commercial Workers Union, Local 206 be settled by arbitration. Pursuant to section 40a(22) of the Act, the termination application in Board File No. 1545-89-R is therefore dismissed.”

In respect of the Minister’s decisions, Knob Hill states that having regard to the merger of the two locals, Local 206 does not exist. Thus, the Minister could not make the decisions, namely to appoint a conciliation officer, and secondly, to refuse a conciliation board.

Leaving aside whether the acts of the Minister are administrative and thus may not be open to judicial review, if the Local does not exist, the appointment by the Minister of a conciliation officer to confer with and effect a collective agreement with such nonexistent local may be the basis of a judicial review. However, where the Minister has refused to appoint a conciliation board whose duty is to effect agreement between the parties on the matters referred to it, and where the only grounds advanced by Knob Hill are as aforesaid, namely, that one of the parties is nonexistent, there is some question as to that being a basis of judicial review. For in such circumstances, it may be argued that Knob Hill in effect is saying that the Minister should have appointed such a board to effect an agreement with a nonentity, while at the same time stating that the Minister could not appoint a conciliation officer to confer with and effect an agreement with a nonentity. In my view, if that be correct, Knob Hill is approbating and reprobating, and this it is not allowed to do as a matter of law. See *Express Newspaper v. News United Kingdom Limited* (1990), 1 W.L.R. 1320. However, I do not rest my decision on such basis, as I shall hereafter set forth, for it may be argued that any decision of the Minister must be based on the existence of an entity, whether it be for or not for a board.

Turning to the Board’s decision, wherein it dismissed the application of Susan Caterina for a decla-

ration that Local 206 no longer represents the employees in the bargaining unit and directed the settlement of a first collective agreement, the grounds of Knob Hills are twofold:

- 1) An appointment of a conciliation officer and a No Board report (being the decisions of the Minister) are condition precedents to the Board directing the settlement of a first collective agreement, and since the Minister's decision was patently wrong, the Board lacked jurisdiction to enter into its inquiry under s.40a of the Act; and
- 2) When the Board decided to hear, and heard, the Caterina application and the first collective agreement application together, it could not invoke s.40a(22) and had to determine both on their merits, which it did not do, and there was thus a breach of natural justice. The Board's interpretation of s.40a(22), according to the applicant, was done so in a patently unreasonable manner, and it thus exceeded its jurisdiction.

As a result of counsel's submissions, I turn first to the stay application. The tests or rules by which a stay is to be considered was recently reviewed by the Supreme Court of Canada in *Manitoba v. Metropolitan Stores Limited* [1987], 1 S.C.R. 110. That was an application to stay a Labour Board's directive to impose a first collective agreement. The issue involved was whether the legislation giving the Board jurisdiction to do so was invalid as contravening the *Charter of Freedoms and Rights*. The Supreme Court of Canada stated at pp.124, 128 and 129 as follows:

"A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions...

The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction ...

The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a *prima facie* case. The injunction will be refused unless he can ... The House of Lords has somewhat relaxed this first test in *American Cyanamid Co. v. Ethicon Ltd.*, [1975], 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court that there was a serious question to be tried as opposed to a frivolous or vexatious claim...

In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the *American Cyanamid* description of the first test ... In my view, however, the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.

The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will

suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.”

It is thus seen from the foregoing that the Supreme Court of Canada did not decide which of the two tests one is to apply, namely the *prima facie* case or the serious question where the case is one other than a constitutional case, as the case at bar is. The matter however, has been addressed by the Divisional Court and its decision is, of course, binding upon me. In *Petro Canada Inc. v. Landcorp Ontario Ltd. et al.* (1988), 21 C.P.R. (3d) 461, the test is stated as follows. The first test applied was that where the facts are not substantially in dispute, the Plaintiff must show a strong *prima facie* case. If there are facts in dispute, the Plaintiff must show that there is a serious question, namely, that the case is not frivolous. Such decision was affirmed by the Divisional Court. See 23 C.P.R. (3d) 344. Also see *C-Cure Chemical Co. v. Olympia and York Developments Ltd.* (1983), 33 C.P.C. 192, a decision of the Divisional Court, the head note of which correctly sets forth the decision, namely that the court applies the strong *prima facie* case test where facts are undisputed and the serious question test where facts are in dispute, the reason being that the onerous test is to be applied where the facts are clear because the decision profoundly affects the parties' rights in a way that cannot be easily undone if after trial the court reaches a different result. Whereas where the facts are in dispute, the court cannot make a reasonable determination of what the facts are likely to be proven at trial.

In the case at bar, the facts are clear and undisputed. Following *stare decisis*, I apply the strong *prima facie* test.

Turning first to the application to stay the Minister's decisions, aside from the question of approbation and reprobation, as hereinbefore stated, in my view, a stay should not be granted for the following reasons. First, as stated in *Manitoba v. Metropolitan Stores Limited*, the same rules apply to a stay as to an interlocutory injunction because they are remedies of the same nature, that is to say, whether it is just and equitable to grant the remedy. In such circumstances, regardless of the tests established, one must also take into consideration the conduct of the applicant. See *Brash Developments Ltd. et al. v. Kits Cameras Ltd.* (1986), 10 C.P.R. (3d) 403.

The decision of the Minister was made almost two years ago in the one instance, that is, the No Board decision, and over two years ago in respect of the other, that is to say the appointment of a conciliation officer. If an application for a stay would have then been brought, the matter could have been determined quite some time ago and Knob Hill would not find itself in the position that it finds itself today, at least in respect of the Minister's decisions. Nor would it have been an answer that a stay would not have been granted because Knob Hill had applied to the Board for a reconsideration of the Local's certification and thus had a statutory remedy available, namely, a reconsideration of the certification. In that regard, see the cases of *Benincasa v. Ballentine et al.* (1978), 7 C.P.C. 81 and *Athabasca Holdings Ltd. v. ENA Datasystems Inc.* (1981), 30 O.R. (2d) 257. I say that it would have been no answer because of the basis of the submission of counsel for Knob Hill that having regard to what the Board stated in *Spar Aerospace Limited* and the Board having determined in its opinion to the Minister that Local 206 could be granted conciliation on November the 8th, 1988, in respect of which Knob Hill had made representations as aforesaid, and which opinion was not reviewable by the courts since it is advisory, that on any reconsideration of the same issue between the same parties, Knob Hill could fairly have expected that the Board would respond identically. In such circumstances, in my view, it could have been argued with much force on an early application for judicial review of the Minister's decision that the remedy available for reconsideration of the Board's certification was illusory. However, even if it could be stated that it is an answer, Knob Hill did apply to the Board to reconsider the certification on the broad grounds, including the non-existence of Local 206 because of merger. It, in effect, withdrew such grounds, for it “advised the Board that it does not dispute the existence of Local 206 in this pro-

ceeding". Counsel for Knob Hill stated before me that it did so because of the *Spar Aerospace* decision. Although there is no sworn evidence of this before me, I accept for the purpose of the submission such explanation, although I am not entirely convinced that the words of the Board in the *Spar Aerospace* decision are to be interpreted as being mandatory, as Knob Hill intends.

In my view, this does not assist the applicant. The decision dismissing Knob Hill's second application for a reconsideration was on January the 31st, 1990. Knob Hill could then have brought the present application for judicial review of the Minister's decision. It did not do so. It was then well aware that the next step was a direction for settlement of a first contract. Furthermore, it could have asked the Board on its second reconsideration to rule on such ground, knowing as it contends, what the result would be and then apply for judicial review of the dismissal of such second reconsideration. It did not do so, but consciously withdrew such grounds on the second reconsideration and stated that "it does not dispute the existence of Local 206 in this proceeding". The proceeding, of course, is to set aside the certification of Local 206 as the bargaining unit, which, as hereafter set forth, is a most important determination, as such determination is the very basis upon which all other proceedings rest.

What then has Knob Hill done? It states, in a proceeding to determine who is the bargaining agent, that it does not dispute the existence of Local 206. In effect, in a negative way, it is an admission for the purpose of certification as a bargaining agent that Local 206 exists. The Board determines that status as it has the statutory duty and jurisdiction to do. Having thus acted and stated, Knob Hill now states that the Minister's decisions cannot stand because Local 206 is nonexistent. This, after having, in effect, admitted before the Board that Local 206 exists for the purpose of being the bargaining agent with whom a collective agreement is to be made if the Board determines it to be the bargaining agent.

In my view, Knob Hill is approbating and reprobating. Furthermore, it is a fair inference from the foregoing that Knob Hill, but its not bringing forward a timely application for judicial review and by consciously withdrawing the ground before the board on its second reconsideration and stating unequivocally that it does not dispute the existence of Local 206 in the Board's consideration of whether the certification is to stand or not, is attempting by this manoeuvring to delay the proceedings by bringing up the point a number of years later, this especially in view of the Board's finding in the matter now before the courts. In my view, having regard to such conduct, it is not just nor equitable to grant the remedy of a stay.

Secondly, in my view, Knob Hill has not presented a strong *prima facie* case. In my view, the determination by the Board after two reconsiderations, one of which was judicially reviewed, that Local 206 was the bargaining agent, is an adjudication pronounced upon the status of a particular entity or person by a tribunal having competent authority for that purpose. See *Hill v. Clifford* [1907], 2 Ch. D. 236, a decision of the English Court of Appeal, affirmed by the House of Lords [1908] A.C. 12 and 15. It is a judgment "in rem". One then must determine what is conclusive evidence against strangers in respect of the adjudication and what is merely *prima facie* evidence.

The *Hill* case addresses this issue. In that case, a medical man was struck off the register for improper conduct. An action was then brought by a stranger to the medical council proceedings for damages against such former medical man. The question arose as to what was the effect of the proceedings before the medical council. The court held that the order of the medical council that the defendant was no longer a medical man, that is to say that he was struck from the register, was an adjudication on status and was conclusive evidence. As for the grounds found leading up to such adjudication, namely the improper conduct, it was *prima facie* evidence which could be rebutted.

Thus in the case at bar, the certification of Local 206 as the bargaining agent is conclusive evidence

against the whole world, namely, that Local 206 is the person to deal with for a first collective contract. Furthermore, it was so admitted by Knob Hill in the second reconsideration, as hereinbefore stated. The Minister is entitled to act thereon. The world is entitled to act thereon.

Knob Hill, however, submits that the Board itself does not recognize the principles of a judgment "in rem," and so it should not apply. It cites the decision of the Board in *Ontario Nurses' Association v. Oakwood Park Lodge*, Board File No. 0557-80-R. In that case, a local applied to be certified. Some years previous, a different local had applied and was certified, and it was found on the first application that certain employees were not management. It was submitted on the second application by the different local that the status of the persons as employees, as found in the other application, was an adjudication "in rem" and was conclusive evidence.

With all due respect to the Board, it came to a proper conclusion, having regard to the *Hill v. Clifford* case, namely that the finding that the status of the employees on the first application was only *prima facie* evidence to be rebutted and not an adjudication "in rem," however, its reasoning, in my view, was not correct. What was the judgment "in rem" on the facts in the *Oakwood Park* matter was the certification of the first local as a bargaining agent, and it was so until terminated by further order of the Board. What was admissible as *prima facie* evidence to be rebutted was the finding of the Board in the first application as to who were employees and who were in management, in order to arrive at the requisite number to determine the certification. Where the Board went astray in the *Oakwood Park* decision is that it was misled by the word "status" in the definition of "judgment in rem". It is not the status of any person or thing found by a tribunal leading up to the ultimate decision or judgment that is the judgment "in rem"; it is the status of the person or thing as declared in the ultimate decision or judgment that is the judgment "in rem," namely, the local that is certified as the bargaining agent. Moreover, the Board to an extent relied on the principles found in such English cases as *Hollington v. Hewthorne* [1943], K.B. 587, a decision of the English Court of Appeal. The case and these principles were disapproved of by the Court of Appeal of Ontario in the later decision of *Demeter v. British Pacific Life Insurance Company* (1985), 48 O.R. (2d) 66, and the principle in such English cases is not the law of Ontario.

Furthermore, the Board in *Oakwood Park* recognized that whether a trade union is the bargaining agent for a group of employees is an "in rem" decision (see paragraph 17 of the decision), but that it was not dealing with such a case before it. Even if it could be said that this is not an adjudication "in rem," the matter was reconsidered by the Board, and Knob Hill consciously withdrew its objection that the local was nonexistent in that proceeding. The matter is *res judicata*. See *Fidelitas Shipping Co. v. V/O Export Chleb* [1965], 2 All E.R. 4 at p. 14, per Lord Justice Diplock, as he then was. In my view, the Minister in the circumstances of this case is privy thereto, the certification being a condition precedent to his determination and the very basis upon which his determinations are made, and he can rely on such principle of *res judicata*. See *Eyton Bartlett v. Charles* [1890], 45 CH.D. 458 at pp. 460 - 462.

Even if the doctrine of *res judicata* does not apply, there is on record evidence of the admission in effect of Knob Hill that Local 206 exists qua its certification, which is, as I have stated, a condition precedent to the Minister's appointment and to a No Board determination.

Furthermore, what Knob Hill is attempting to do is to mount a collateral attack on the order of the Board as to certification, while such order remains unvaried and unchanged and in existence after two reconsiderations and a judicial review. This it cannot do, and the order must receive full effect according to its terms. See the cases collected in *Wilson v. The Queen* [1983], 2 S.C.R. 594. See also *Johnston v. The Law Society of Prince Edward Island* (1989), 59 D.L.R. (4th) 599 at p. 603. And see also the *Demeter* case, at page 268, where it is said:

"We are equally of the view that the use of a civil action to initiate a collateral attack on a final decision of a criminal court of competent jurisdiction in an attempt to relitigate an issue already tried is an abuse of the process of the court."

Furthermore, it is an abuse of the process to litigate by instalments, as Knob Hill is attempting to do in this proceeding. See *Abacus Cities Ltd. v. Bank of Montreal* [1988], 1 W.W.R. 78, a decision of the Alberta Court of Appeal, and *Johnston v. Law Society of P.E.I. et al.* (1990), 70 D.L.R. (4th) 278, a decision of the Prince Edward Island Court of Appeal.

For all these reasons, in my view, Knob Hill has failed to present, and there is not, a strong *prima facie* case.

As for the matter of hardship and inconvenience, I will address that matter hereafter.

The application for a stay of the Minister's appointment and refusal is dismissed.

Turning to the orders of the Board dismissing the application of Susan Caterina for a declaration that Local 206 no longer represents the employees and directing the settlement of a first collective agreement by arbitration, I have already gone into the matter of the attack on the Minister's appointment and refusal, which decisions are conditions to the Board's directing a settlement of a first collective agreement by arbitration. I have already found that Knob Hill has failed to present a strong *prima facie* case in that regard, and I need not reiterate my reasons therefor.

As for the second ground, this entails an interpretation of s.40a(22) of the *Labour Relations Act*. The onus is upon Knob Hill to put forth a strong *prima facie* case that the Board's interpretation was so patently unreasonable that its construction cannot be rationally supported by the relevant legislation. See *C.U.P.E. v. New Brunswick Liquor Corporation* [1979], 2 S.C.R. 227 at 237, and *National Corn Growers v. C.I.T.* [1990], 2 S.C.R. 1325.

The Board's interpretation of s.40a(22) is found in paragraphs 11, 49, 50, 51 and 52 of its decision. It is wise to repeat them again at this point:

"11. Upon hearing the representations of the parties with respect to how it should proceed with these two applications, the Board unanimously ruled (orally) that it would hear them together and then make the requisite determination under section 40a(22). The Board was satisfied that that determination could not be made in this case in the absence of the evidence and representation of the parties with respect to applications.

49. We are satisfied that the process of collective bargaining between the parties has been unsuccessful because of Knob Hill's refusal to recognize the bargaining authority of Local 206, the uncompromising positions adopted in bargaining by Knob Hill without reasonable justification, and the failure of Knob Hill to make reasonable or expeditious efforts to conclude a collective agreement.

50. We are satisfied that Knob Hill's conduct, and its approach to bargaining, were designed to not only defeat collective bargaining, but also to communicate to the bargaining unit employees a very simple message:

unionization has not and will not bring you anything. That this message was received by the employees is demonstrated by the evidence of Susan Caterina, the applicant in the termination proceeding, who testified before the Board that 'I just know the union hasn't done anything for us' and who, in preparing to bring her application, circulated a letter soliciting support, which letter contains the following statement:

I don't believe that the Union has done anything for us since it got in and I don't want to start paying union dues each month for the same wages and benefits we would have received with or without a union.

51. The sections of the *Labour Relations Act* which provide for the termination of a trade union's bargaining rights contemplate that the trade union which has been certified by the Board will have some time (a minimum of six months in the construction industry and one year outside of the construction industry) to prove itself to the employees it represents. In our view, Local 206 has not had that opportunity in its relations with the employees of Knob Hill. While Local 206 has itself contributed to that situation, its primary cause is the product of Knob Hill. In the circumstances, including the certification of Local 206 pursuant to section 8 of the Act, Knob Hill's failure to comply with the directions of the Petryshen panel, the dates of the two applications herein, and the conduct of Knob Hill and the effect of that conduct, we find it appropriate, in the exercise of our discretion under section 40a(22) of the Act to consider the first contract application herein first.

52. In the circumstances herein, and having regard to our findings as aforesaid, the Board finds it appropriate to direct that a first contract collective agreement between Knob Hill arms Limited and the United Food and Commercial Workers Union, Local 206 be settled by arbitration. Pursuant to section 40a(22) of the Act, the termination application in Board File No. 1545-89-R is therefore dismissed."

In effect, the Board heard the evidence of both applications and then determined which it should determine first, and having reached the determination that the first contract application was to be determined first pursuant to the section, it dismissed it and pursuant to the section, it dismissed the termination application because it remained undetermined. Although in the quotation of the Board hereinbefore set forth, the Board uses the word "determine," it is clear that it is using such word in the sense of deciding. If one then substitutes the word "determine" in the last part of s.40a(22), it reads:

"The Board shall determine the applications in the order that it determines appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains undetermined."

The Board stated that the determination as to which application it was to render a decision upon first could not be made in the absence of evidence and representations of the parties with respect to the applications before it and heard the evidence and representations of both applications. The Board then determined that:

"in the circumstances, including the certification of Local 206 pursuant to section 8 of the Act, Knob Hill's failure to comply with the directions of the Petryshen panel, the dates of the two applications herein, and the conduct of Knob Hill and the effect of that conduct, we find it appropriate, in the exercise of our discretion under section 40a(22) of the Act to consider the first application herein first."

Part of the conduct referred to is found at paragraph 50, which states:

"We are satisfied that Knob Hill's conduct, and its approach to bargaining, were designed to not only defeat collective bargaining, but also to communicate to bargaining unit employees a very simple message: unionization has not and will not bring you anything."

It is also clear from the reasons that the Board had in mind what I might term the Egan Principle which is found in paragraph 8 of the Board's reasons:

"In *Egan Visual Inc.*, [1986] OLRB Rep. Aug. 1071, the Board considered a situation in which a trade union had been certified on February 18, 1985, a termination application had been filed on April 4, 1986 and was scheduled to be heard on July 7, 1986, section 40a of the Act had come into force on May 26, 1986, and the trade union therein had filed its application for direction under section 40a on July 3, 1986. In concluding that the termination and the first contract applications should proceed together in order to enable the Board to properly determine which one it should consider first, the Board observed that the order in which the applications were filed was a relevant but not determinative factor. It also recognized that the wisdom or usefulness of

directing that a first contract be settled by arbitration was open to question in circumstances where the employees affected no longer support the trade union concerned. On the other hand, observed the Board, if the trade union's support had been eroded as a result of the employer's actions in bargaining (or perhaps otherwise, we suggest), then an arbitrated first collective agreement may well be appropriate."

It is thus clear that the Board felt that it needed to hear evidence and representations as to whether the employees affected no longer support the Local other than as a result of the employer's actions in the bargaining, or to put it another way, in effect whether the erosion was as a result as set forth in paragraph 50 hereinbefore quoted. Having come to that determination, it determined that the first contract application be determined first and directed the first contract arbitration, and as responding counsel put it during submissions, the section then kicked in and the termination application was dismissed pursuant to the section.

It is the position of Knob Hill that once the Board decided that the two applications were to be heard together, and once the evidence were led in both applications, it was incumbent upon the board to render a decision on the merits in respect of both applications. Otherwise, it states, there would be, and there was, a breach of natural justice in respect of the termination application and the Board lost jurisdiction. Accordingly, the applicable legislation should not be interpreted in such a manner that there would be a breach of natural justice. According to Knob Hill, the Board could determine which application to hear first upon, for want of a better word, the pleadings and other documents filed on an application and determine which application was to be heard on that basis, and once having determined that, then to enter into the hearing of evidence on the application in question, and if it granted that application, it could dismiss the other application pursuant to s.40a(22). Knob Hill states that the true reading of s.40a(22) is:

"The Board shall entertain the applications in the order that it determines appropriate, and if it grants one of the applications, it shall dismiss any other application described in this section that remains unentertained."

In my view, Knob Hill has not put forth a strong *prima facie* case for the following reasons: First, what Knob Hill complains about, namely once you entertain an application, you must render a decision on the merits or else there is a breach of natural justice, is equally true of the interpretation put on the section by Knob Hill. For once an application is filed, it is to be determined on the merits, otherwise there is also a breach of natural justice. An application is not to be dismissed without hearing the applicant fully, namely the leading of evidence, representations and a full and complete hearing. In that regard, see *Re Toronto Newspaper Guild, Local 87* (1951), O.R. 435; *Re Fremington School* [1846], 10 Jus. (O.S.) 512; *Osgood v. Nelson* [1872], L.R. 5 H.L. 636 at 646 and 650; *Re General Accident Assurance Co. of Canada* [1926], 2 D.L.R. 390 at 398; *Regina v. Kingston-Upon-Hull Rent Tribunal Ex Parte Black* (1949), 65 T.L.R. 209.

Having regard to that, I especially asked counsel for Knob Hill whether he attacks the section as being in violation of the *Charter of Rights* or that the section is inherently bad and should be set aside. He specifically stated that he does not do so. In such circumstances, the submissions of Knob Hill lose much force in that no matter what interpretation one places upon the section, it is open to an attack as aforesaid. Knob Hill has specifically stated that the basis of its attack is not that the section is inherently bad or violates the *Charter of Rights*.

Secondly, there is the rule of construction of statutes enunciated by Gale, J., as he then was, in *Giffels and Vallet* [1952], 1 D.L.R. 620 at 630, affirmed [1952], 2 D.L.R. 720, namely:

"While it is quite true that a word may have different meanings in the same statute or even in the same section, it is not to be forgotten that the first inference is that a word carried the same connotation in all places where it is found in a statute."

I am well aware that the “first inference” is merely that, and that there are many instances where the application of this inference is impossible or would result in injustice or absurdity, in which case the word is given different meanings. However, the rule is there, and the first inference is that the interpretation of the Board, namely the same meaning for the word “consider” as hereinbefore stated is proper. I merely point out that as a first step in interpretation what was done by the Board was proper, subject to other considerations, including: Does it result in absurdity or injustice?

Thirdly, one must keep in mind the principles in the *National Corn Growers* case hereinbefore cited, at pages 1336 to 1338, namely:

- 1) Statutory provisions often do not yield a single uniquely correct interpretation, but can be ambiguous or silent on a particular question or couched in language that obviously invites the exercise of discretion; and
- 2) Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the front line agency than the limited knowledge, detachment and modes of reasoning typically associated with courts of law.
- 3) If the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the court will not intervene.

As was pointed out by counsel for the Minister, if the interpretation of Knob Hill was the proper interpretation, then having regard to the first part of the section in question, if the Board had started to hear evidence as to a first contract, but had not finally decided it, and an employee had then filed an application to terminate the certification, the board would have had to determine the first contract application without reference to the termination application. And if it granted the first contract application, the termination application would automatically be dismissed. This would, in effect, defeat the very purpose of the section.

Furthermore, the Board, to a degree, is determining the applications on their merits by hearing the evidence of the two together. As in the case at bar, it does so to determine whether the employer is the cause of the erosion, a legitimate investigation, and if it so considers such action of the employer, as in the case at bar, it determines the order accordingly.

Having regard to the interpretation put on the section by the Board, especially their determination that they had to hear evidence to determine whether the conduct of Knob Hill in bargaining resulted in the erosion of the affected employees’ support of the Local and to hear evidence as to such conduct, and the determination thereof by the Board in part by the *viva voce* evidence heard, and having regard to what I have hereinbefore stated, including the principles hereinbefore set forth, it is my view that Knob Hill has not presented, and there is not, a strong *prima facie* case that the interpretation by the Board of s.40a(22) is patently unreasonable.

Turning then to the other tests, the applicant states that if it were ultimately successful, it could not be compensated satisfactorily in damages for the interim imposition of a contract which would possibly result in conditions of work that do not presently exist or conditions as to the determination of grievances, or the restriction of Knob Hill’s right to contract out work, for example, which would come into play during the period that the case was not heard by the Divisional Court. True, counsel states that the contract arbitrated would fall, but the imposition of the terms thereof until the matter was ultimately heard would result in irreparable harm to Knob Hill. Although the foregoing is argued on the basis of a possibility, and perhaps it would have greater force if the applica-

tion to stay were brought on after the contract had been arbitrated but before it was put into effect, in my view, even if that proposition is accepted, the matter is not carried much further having regard to the hardship upon the Local. There is in existence evidence of erosion of local support, and if, as counsel for Knob Hill submits, there is not a specific finding by the Board that such erosion is a result of the conduct of Knob Hill, although the Board's reasons hereinbefore referred to appear to be to the contrary, at the least there is a strong inference that such erosion was caused by the action of Knob Hill. Any further delay in the matter before carried forward would cause further erosion, resulting in irreparable harm to the Local.

In my view, balancing the two, the harm to the Local is the greater of the two harms, this especially when one considers not only the conduct of Knob Hill, but also the fact that the certification occurred over three and a half years ago and there has not been, as yet, a first contract between the parties, let alone any *bona fide* bargaining in respect thereof, according to the Board, with the result that except for wages, the terms of employment have been frozen. As was stated by Reid, J. in *Re United Headwear* (1983), 41 O.R. (2d) 287 at p. 292:

"It is a truism of labour relations law that delay works unfairness and hardship".

In this respect, if a stay were granted and there was a delay in the bargaining of a first contract, that delay would work unfairness and hardship.

I do not go into the matter of status of Knob Hill in respect of the manner in which the determination of the Susan Caterina application was terminated by the board, where Susan Caterina has not appeared before me, although served, and has not brought her own application for review. I do so not out of disrespect for the very able submissions made by counsel, but rather, having regard to what I have hereinbefore stated, it is not necessary for me to do so.

As it is important that the parties know quickly the result of the applications before me, so that they can order their affairs accordingly, I have come to this determination as quickly as I could, with the result that the reasons for judgment may not be as concise nor as structured as I would normally prefer them to be.

As I have found that Knob Hill has not presented, nor is there, a strong *prima facie* case, the s.6(2) application of Knob Hill is, in accordance with counsel's wishes, withdrawn, and the application for a stay, for the reasons given, is dismissed.

The matter of costs?

--- Submissions by Counsel ---

THE COURT: I have endorsed the record as follows: In accordance with counsel's wishes, s.6(2) application is withdrawn; application for a stay dismissed. To make assurances doubly sure, the matter is referred to the Divisional Court. No costs to the Board and the Minister, it being agreed between the parties that even if successful before Divisional Court, there are to be no costs for or against the Board and/or the Minister in respect of the applications before me. As for the Local, for reasons stated during submissions, costs are reserved to the Divisional Court.

2241-86-R (Court File Nos. 22355 & 22387) Ontario Hydro and Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union, Local 1000, Appellants v. Ontario Labour Relations Board, The Society of Ontario Hydro Professional and Administrative Employees, The Coalition to stop certification of the Society on behalf of certain employees, Tom Stevens, C.S. Stevenson, Michelle Morrissey-O’Ryan and George Orr, Respondents v. The Attorney General of Canada, Intervener

Certification - Constitutional Law - Judicial Review - Board determining that it had no jurisdiction over employees working at nuclear generating stations which were federal undertakings pursuant to the *Constitution Act* and s.18 of the *Atomic Energy Control Act* - Divisional Court quashing Board decision - Court of Appeal reinstating Board decision and declaring that *Canada Labour Code* applies to Hydro employees employed at nuclear facilities coming under s.18 of the *Atomic Energy Control Act* - Application for leave to appeal granted by Supreme Court of Canada

Board decision reported at [1988] OLRB Rep. Feb. 187; Divisional Court decision reported at [1989] OLRB Rep. June 698; Court of Appeal decision reported at [1991] OLRB Rep. Jan. 115.

Supreme Court of Canada, L’Heureux-Dubé, Gonthier and Jacobucci JJ., July 4, 1991.

THE COURT: The application for leave to appeal is granted.

CASE LISTINGS JUNE 1991

	PAGE
1. Applications for Certification	145
2. Applications for First Contract Arbitration	157
3. Applications for Declaration of Related Employer.....	158
4. Sale of a Business	158
5. Applications for Declaration Terminating Bargaining Rights.....	158
6. Ministerial Reference (Conciliation Officer).....	160
7. Complaints of Unfair Labour Practice	160
8. Applications for Consent to Early Termination of Collective Agreement	163
9. Jurisdictional Disputes.....	163
10. Applications for Determination of Employee Status.....	164
11. Complaints under the Occupational Health and Safety Act	164
12. Construction Industry Grievances	164
13. Applications for Reconsideration of Board's Decision	168
14. Right of Access	169

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1398-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Reemark Group Inc./Reemark Services Management Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1986-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ryder Concrete Forming Specialists Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2551-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rome Carpentry Co. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2236-90-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 141 (Applicant) v. Summit Food Distributors Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (35 employees in unit) (*Having regard to the agreement of the parties*)

2721-90-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Motor Coach Industries Ltd. c.o.b. as M.C.I. Service Parts Company (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Newcastle, save and except supervisors, persons above the rank of supervisor, and students employed during the school vacation period” (22 employees in unit)

3363-90-R: Energy & Chemical Workers Union (Applicant) v. United Food & Commercial Workers International Union, Locals 175 & 633 (Respondent)

Unit: “all employees of the respondent in Ontario, save and except Regional Directors and persons above the rank of Regional Director, all members of the Executive Boards of Locals 175 and 633, the Manager of Administration, the Controller, the Executive Secretary to the President, and persons for whom any trade union held bargaining rights as of March 15, 1991” (21 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0246-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Wood & Nail Finishing Carpentry (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0327-91-R: Canadian Union of Public Employees (Applicant) v. Notre Dame Hospital (Respondent) v. Group of Employees (Objectors)

Unit: “all office and clerical employees of the respondent at Hearst, save and except department heads, persons above the rank of department head, personnel officer, payroll officer, secretary to the administrator, secretary to the assistant administrator, secretary to the director of nursing, secretary to the personnel officer, and employees in bargaining units for whom any trade union held bargaining rights as of April 25, 1991” (14 employees in unit) (*Having regard to the agreement of the parties*)

0360-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Keskon Servicing Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

0425-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Stanley Acmetrack Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0435-91-R: United Food & Commercial Workers International Union, AFL:CIO:CLC: (Applicant) v. 900501 Ontario Ltd. c.o.b. as Loeb IGA Huron (Respondent) v. Mary Maguire & Dave Shingler (Objectors)

Unit: “all employees of the respondent in the City of London, save and except Department Managers, Head

Cashier, Night Manager, persons above the rank of Department Managers, office and clerical staff” (188 employees in unit) (*Having regard to the agreement of the parties*)

0439-91-R: Christian Labour Association of Canada v. A & W High Voltage Contracting Ltd. (Respondent)

Unit: “all power linemen and power lineman apprentices, in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0440-91-R: Ironworkers District Council of Ontario (Applicant) v. M.N.T. Builders Ltd. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0457-91-R: Sheet Metal Workers’ International Association, Local 47 (Applicant) v. Jennick Mechanical Contractors Ltd. (Respondent)

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0496-91-R; 0020-91-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Vulcan Packaging Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at its T & S Plastics Division in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and office and sales staff” (40 employees in unit) (*Having regard to the agreement of the parties*)

0513-91-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Applicant) v. R. Graham Welding & Mechanical (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0515-91-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Aspen Interior Systems Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the

Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0517-91-R: Canadian Union of Public Employees (Applicant) v. Huron-Perth County Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit #1: “all office and clerical employees and teaching assistants in the employ of the respondent in the Counties of Huron-Perth, save and except supervisors and those above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons for whom any trade union held bargaining rights as of May 13, 1991” (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all office and clerical employees and teaching assistants in the employ of the respondent in the Counties of Huron-Perth regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and those above the rank of supervisor, and persons for whom any trade union holds bargaining rights as of May 13, 1991” (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0569-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. York Lathing (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0572-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Positive Electric Company Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0602-91-R: United Steelworkers of America (Applicant) v. Norcon Industries Inc. (Respondent)

Unit: “all employees of the respondent in the District of Sudbury, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

0603-91-R: United Steelworkers of America (Applicant) v. Country Village Health Care Centre (Respondent)

Unit: “all registered and graduate nurses of the respondent in the County of Essex, save and except the Director of Resident Care and persons above the rank of Director of Resident Care” (9 employees in unit) (*Having regard to the agreement of the parties*)

0604-91-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Racal-Chubb Canada Inc. (Respondent)

Unit: “all employees of the respondent at its Chubb Security Systems division in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and technical employees and per-

sons regularly employed for not more than 24 hours per week” (27 employees in unit) (*Having regard to the agreement of the parties*)

0624-91-R: Teamsters Local No. 879 (Applicant) v. D. J. Fast Trucking Contractors Ltd. (Respondent)

Unit: “all employees of the respondent in the City of St. Catharines, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (27 employees in unit) (*Having regard to the agreement of the parties*)

0626-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Arcam Engineering Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building and the District of Manitoulin (except that portion of the District of Manitoulin which comes within the Board Area #17), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0627-91-R: Graphic Communications International Union, Local 500M (Applicant) v. Westport Press Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Mississauga, save and except office staff, sales staff, non-working forepersons, those above the rank of non-working forepersons, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (23 employees in unit) (*Having regard to the agreement of the parties*)

0642-91-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Whitchurch - Stouffville (Respondent)

Unit: “all employees of the respondent in the Town of Whitchurch - Stouffville, save and except forepersons, persons above the rank of foreperson, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*)

0644-91-R: Canadian Union of Public Employees (Applicant) v. Salvation Army Grace Hospital (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons for whom any trade union held bargaining rights as of May 27, 1991” (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0663-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Aggregate Recycling (Western) Inc. (Respondent)

Unit: “all employees of the respondent in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers and truck drivers in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

0665-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Countryside Farms Ltd. (Respondent)

Unit: “all construction labourers and truck drivers in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (13 employees in unit)

0666-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. The Brick Warehouse Corporation (Respondent)

Unit: “all employees of the respondent at 5711 Steeles Ave. West in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and office and clerical staff” (13 employees in unit) (*Having regard to the agreement of the parties*)

0677-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Karwald Industries Ltd. (Respondent)

Unit: “all employees of the respondent at 5115 Maingate Drive, Mississauga, save and except foremen, persons above the rank of foreman, installers, truck drivers, office, clerical and sales staff, and students employed during the school vacation period” (40 employees in unit) (*Having regard to the agreement of the parties*)

0682-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. W-A Construction Company Ltd. (Respondent)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 2260 Weston Road in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, office and sales staff, persons regularly employed for not more than 19 hours per week and students employed during the school vacation period” (2 employees in unit) (*Having regard to the agreement of the parties*)

0683-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. W-A Construction Company Ltd. (Respondent)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 3275 Sheppard Avenue East in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, office and sales staff, persons regularly employed for not more than 19 hours per week and students employed during the school vacation period” (3 employees in unit) (*Having regard to the agreement of the parties*)

0684-91-R: Labourers’ International Union of North America, Local 184 (Applicant) v. W-A Construction Company Ltd. (Respondent)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 775 Steeles Avenue West in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, office and sales staff, persons regularly employed for not more than 19 hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

0685-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. W-A Construction Company Ltd. (Respondent)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 1 and 2 Meadowglen Place in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, office and sales staff, persons regularly employed for not more than 19 hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

0686-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. W-A Construction Company Ltd. (Respondent)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 8 Godstone Road in the

Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, office and sales staff, persons regularly employed for not more than 19 hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

0708-91-R: Energy & Chemical Workers Union (Applicant) v. George G. Thorne Ltd. (Respondent)

Unit: “all employees of the respondent in Murray Township, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

0709-91-R: Energy & Chemical Workers Union (Applicant) v. George G. Thorne Ltd. (Respondent)

Unit: “all employees of the respondent in Murray Township, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

0714-91-R: Ontario Nurses’ Association (Applicant) v. The Penetanguishene General Hospital (Respondent)

Unit: “all lay, registered and graduate nurses employed in a nursing capacity by Penetanguishene General Hospital at Penetanguishene, save and except Head Nurse, persons above the rank of Head Nurse and persons regularly employed for not more than 24 hours per week” (22 employees in unit) (*Having regard to the agreement of the parties*)

0733-91-R: Ontario Public Service Employees Union (Applicant) v. The Mississauga Hospital (Respondent) v. Group of Employees (Objectors)

Unit: “all medical laboratory technologists regularly employed for not more than 24 hours per week and students employed during the school vacation period employed by the Mississauga Hospital in its medical laboratories at Mississauga, save and except chief technologist and persons above the rank of chief technologist, medical laboratory technology students, office and clerical staff and persons covered by subsisting collective agreements as of June 4, 1991” (25 employees in unit) (*Having regard to the agreement of the parties*)

0755-91-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Niagara South Board of Education (Respondent)

Unit: “all adult basic learning instructors, English or French as second language instructors and driver education instructors of the respondent in the Regional Municipality of Niagara, save and except superintendents of planning and research and persons above the rank of superintendent of planning and research and persons for whom any trade union held bargaining rights as of June 6, 1991” (20 employees in unit) (*Having regard to the agreement of the parties*)

0783-91-R: Service Employees Union, Local 268 affiliated with the A.F. of L., C.I.O., and C.L.C. (Applicant) v. The General Hospital of Port Arthur (Respondent)

Unit: “all office and clerical employees of the respondent in the City of Thunder Bay, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, confidential secretary to the Executive Director, confidential secretary to the Associate Executive Director, confidential secretary to the Executive Director - Patient Services, confidential secretary to the Assistant Executive Director - Human Resources, clerk employed in a confidential capacity in the office of the Assistant Executive Director - Human Resources, confidential payroll clerk, collection officer, technical personnel, persons employed on a temporary or casual basis, students employed on a co-operative work-study programme and persons covered by subsisting collective agreements” (43 employees in unit) (*Having regard to the agreement of the parties*)

0784-91-R: Canadian Guards Association (Applicant) v. Ottawa Congress Centre/Centre de Congress D’Ottawa (Respondent)

Unit #1: “all security guards of the respondent in the City of Ottawa, save and except supervisor, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week” (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all security guards of the respondent in the City of Ottawa regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

0792-91-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Muskoka Board of Education (Respondent)

Unit: “all teachers assistants, communications disorder assistants and behaviour support workers of the respondent in the District of Muskoka, save and except supervisors and persons above the rank of supervisor” (48 employees in unit) (*Having regard to the agreement of the parties*)

0801-91-R: Hotels, Clubs, Restaurants, Taverns Employees Union, Local - 261 (Applicant) v. Lorne Murphy Foods Ltd. (Respondent)

Unit: “all employees of the respondent at Tunney’s Pasture, 120 Parkdale Ave., Ottawa, save and except Managers, persons above the rank of Manager, Accountant, Payroll Clerk/Buyer, Secretary to the Director of Operations, Executive Chef, persons employed for not more than 24 hours per week and students employed during the school vacation period” (77 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0858-91-R: United Steelworkers of America (Applicant) v. Can-Air Manufacturing (1990) Inc. (Respondent)

Unit: “all employees of the respondent in the District of Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of June 13, 1991” (32 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0086-91-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Metropolitan General Hospital (Respondent) v. Service Employees’ International Union, Local 210 (Intervener)

Unit: “all employees of the employer, save and except professional medical staff, registered nurses, undergraduate nurses, graduate pharmacists, graduate dietitians, students dietitians, technical personnel, registered nursing assistants, ward assistants, supervisors and persons above the rank of supervisors, office staff, engineers and boiler house employees working under the supervision of the Chief Engineer, and persons covered by other subsisting collective agreements” (245 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	245
Number of persons who cast ballots	181
Number of ballots marked in favour of applicant	130
Number of ballots marked in favour of intervener	51

0141-91-R: Ontario Public School Teacher’s Federation (Applicant) v. The Board of Education for the City of Etobicoke (Respondent)

Unit: “all educational assistants employed by the respondent in the Municipality of Metropolitan Toronto, save and except assistant superintendents, persons above the rank of assistant superintendent, persons regularly employed for less than 15 hours per week and persons in bargaining units for which any trade union held bargaining rights as of April 12, 1991” (101 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	101
Number of persons who cast ballots	55
Number of ballots marked in favour of applicant	40

Number of ballots marked against applicant

15

0162-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. Board of Education for the City of Hamilton (Respondent)

Unit: "all office, clerical and technical employees employed by the respondent in the City of Hamilton, save and except supervisors and managers, persons above the rank of supervisor and manager, confidential secretaries, negotiations and salary clerk, employee records coordinator, collective bargaining analyst, senior employment officer, employment officer, affirmative action coordinator, wage & salary administrator, internal auditor, budget analyst, chief payroll clerk, assistant to the secretary of the Board, section leader-minutes, students employed during the school vacation period, students employed in co-operative education programs, persons regularly employed for not more than 24 hours per week, and persons in bargaining units for which any trade union held bargaining rights as of April 15, 1991" (356 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	356
Number of persons who cast ballots	259
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	127
Number of ballots marked against applicant	101
Ballots segregated and not counted	30

0347-91-R: Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the City of York (Respondent)

Unit: "all occasional teachers employed by the Respondent in its elementary panel in the City of York, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*, and persons for whom any trade union held bargaining rights as of April 30, 1991, being the date of application" (243 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	252
Number of persons who cast ballots	43
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote**0085-91-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Salvation Army Grace Hospital (Respondent) v. Service Employees' International Union, Local 210 (Intervener)**

Unit: "all employees of the respondent at its Hospital in Windsor, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, students dietitians, technical personnel, supervisors, persons above the rank of supervisor, chief engineer and persons covered by a subsisting collective agreement between the respondent and the Christian Labour Association of Canada and office staff" (285 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	285
Number of persons who cast ballots	187
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	109
Number of ballots marked in favour of intervener	76
Ballots segregated and not counted	1

0216-91-R: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO, CLC (Applicant) v. Perma-Flex (Canada) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of Peel, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	32
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	10

Applications for Certification Dismissed Without Vote

1735-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Quincon Ltd. (Respondent) v. Group of Employees (Objectors) (13 employees in unit)

1945-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Harnden Dry-wall Systems, A Division of 631715 Ontario Inc. (Respondent) (7 employees in unit)

3368-90-R: United Steelworkers of America (Applicant) v. Wiresmith Ltd. (Respondent) (47 employees in unit)

0143-91-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Ross-Clair Division of R.O.M. Contractors Inc. (Respondent) (3 employees in unit)

0214-91-R: Canadian Brotherhood of Railway Transport & General Workers (Applicant) v. Legislative Assembly, Government of Ontario (Respondents) v. Ontario Public Service Employees Union, Local 593 (Intervener) v. Group of Employees (Objectors) (27 employees in unit)

0339-91-R: United Steelworkers of America (Applicant) v. Today's Business Products (Respondent) (96 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0142-91-R: Service Employees' International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Central Park Lodges Ltd. c.o.b. as Charlotte Villa (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Brantford, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurse, office and clerical employees” (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	30
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	15

0468-91-R: IWA - Canada (Applicant) v. Deerhurst Resorts Ltd. c.o.b. Deerhurst Resort (Respondent)

Unit: “all employees of the respondent in the Municipality of Huntsville, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, *shuttle drivers*, golf shop clerks, pavilion theatre personnel, construction trades, golf, tennis and squash professionals, persons who are regularly employed for not more than 24 hours per week and students employed during the school vacation period and real estate personnel” (127 employees in unit)

Number of names of persons on revised voters' list	161
Number of persons who cast ballots	137

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	123
Number of segregated ballots cast by persons whose names appear on voters' list	14
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	88
Ballots segregated and not counted	14

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2808-90-R: Ontario Public Service Employees Union (Applicant) v. St. Francis Memorial Hospital Association (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent at Barry's Bay, save and except supervisors, persons above the rank of supervisor, paramedical employees, administrative secretary, accounting clerks and employees in bargaining units for which any trade union held bargaining rights as of January 24, 1991" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	7

Applications for Certification Withdrawn

3168-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Shearwell Forming (East) Ltd. (Respondent) v. The Form Work Council of Ontario (Intervener)

0173-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Automatic Structures Ltd. (Respondent) v. The Form Work Council of Ontario (Intervener)

2237-90-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 141 (Applicant) v. Summit Food Distributors Inc. (Respondent)

3175-90-R: Bricklayers, Masons Independent Union of Canada (Applicant) v. Midnight Masonry Ltd. and 911043 Ontario Ltd. (Respondent)

0097-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Robert Hume Construction Ltd. (Respondent)

0172-91-R: Nortown Plumbing Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Low Rise Residential Division) (Respondent)

0374-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Hotels Ltd./C.N. Crew Hostel (Respondent)

0446-91-R; 0447-91-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Hotel Inter-Continental Toronto (Respondent) v. Charles Algernon (Objectors)

0520-91-R: United Steelworkers of America (Applicant) v. Northland Power Partnership (Respondent)

0587-91-R: Teamsters Local Union No. 879 (Applicant) v. Browning-Ferris Industries Ltd. (Respondent)

0662-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Peran Contracting (1987) Inc. (Respondent)

0695-91-R; 0794-91-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Inter-Continental Hotel Corporations, c.o.b. as Hotel Inter-Continental (Respondent) v. Group of Employees (Objectors)

0707-91-R: Energy & Chemical Workers Union (Applicant) v. Brian Williams, o/a Imperial Oil (Respondent)

0836-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bfrancos Masonry Ltd. (Respondent)

0837-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Blue River Masonry (Respondent)

0838-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Aja Masonry (Respondent)

0839-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Obidos Masonry (Respondent)

0840-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Atlantic Masonry Ltd. (Respondent)

0841-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. J. I. Construction (Respondent)

0842-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mill Masonry Ltd. (Respondent)

0843-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Blue Sky Masonry Ltd. (Respondent)

0844-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Fersil Masonry (Respondent)

0845-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. One Way Masonry (Respondent)

0846-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Palasar Construction Inc. (Respondent)

0847-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Last Line Masonry Ltd. (Respondent)

0848-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Kasanova Masonry Ltd. (Respondent)

0885-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Moita Masonry Ltd. (Respondent)

0886-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. B. C. Construction Ltd. (Respondent)

0887-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Halton Bricklayers (Respondent)

0888-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Oeste Bricklayer Ltd. (Respondent)

0889-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Keyside Construction Co. Ltd. (Respondent)

0890-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Universal Bricklayers (Respondent)

0891-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Novlar Masonry Ltd. (Respondent)

0892-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. M. L. Masonry (Respondent)

0893-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. C. Santos Masonry (Respondent)

0894-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pombal Masonry Ltd. (Respondent)

0895-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cousin's Masonry Ltd. (Respondent)

0896-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. P & P Construction (Respondent)

0897-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Portuga Construction Ltd. and Astrol Masonry Ltd. (Respondents)

0898-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. R.P.M. Masonry Ltd. & Ribeiro Masonry Inc. (Respondents)

0900-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Trafico Masonry Ltd. (Respondent)

0901-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Matias Masonry Ltd. (Respondent)

0902-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Nordeste Masonry (Respondent)

0903-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Interline Masonry Ltd. (Respondent)

0904-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Bricklayers (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2272-90-FC: Canadian Paperworkers Union (Applicant) v. Great Lakes Community Credit Union Ltd. (Respondent) (*Withdrawn*)

0474-91-FC: International Union of Operating Engineers, Local 796 (Applicant) v. Atlantic & Newsprint & Tissue Whitby (Respondent) (*Withdrawn*)

0505-91-FCA: International Union of Operating Engineers, Local 793 (Applicant) v. Madeleine Mines Ltd. (Respondent) (*Withdrawn*)

0630-91-FC: Labourers' International Union of North America, Local 1059 (Applicant) v. Strathroy Concrete Forming (1988) Inc. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3169-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 833833 Ontario Ltd. c.o.b. as Murphy Construction and Jim McCoy c.o.b. as DBM Construction (Respondents) (*Granted*)

3175-90-R: Bricklayers, Masons Independent Union of Canada (Applicant) v. Midnight Masonry Ltd. and 911043 Ontario Ltd. (Respondent) (*Withdrawn*)

3429-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sala Electric Ltd., Sala Electric Inc. GTG Electric Ltd. & Norbert Electric Ltd. (Respondents) (*Granted*)

0176-91-R: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Valee-Way General Contractors Inc. and Valee-Way General Contractors (1990) Inc. (Respondents) (*Withdrawn*)

0635-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Shelving Displays (1988) Ltd. and Shelving Designs Ltd. (Respondents) (*Withdrawn*)

0681-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. W-A Construction Company Ltd. (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

3169-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 833833 Ontario Ltd. c.o.b. as Murphy Construction and Jim McCoy c.o.b. as DBM Construction (Respondents) (*Granted*)

0176-91-R: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Valee-Way General Contractors Inc. and Valee-Way General Contractors (1990) Inc. (Respondents) (*Withdrawn*)

0296-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 443351 Ontario Ltd. c.o.b. as Marlee Electric Company (Respondent) v. Christian Labour Association of Canada (Intervener) (*Granted*)

0636-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) Shelving Displays (1988) Ltd. and Shelving Designs Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2217-89-R; 3273-89-R: Carlos Valente (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. J. Sousa Contractor Ltd. (Intervener) (20 employees in unit) (*Dismissed*)

3043-89-R: Ubaldo Marcheschi on his own behalf and on behalf of a group of employees (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Ottawa Greenbelt Construction Ltd. (Intervener)

Unit: "all employees of the employer engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the roads, sewers and watermains and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell" (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2
Ballots segregated and not counted	1

0274-90-R: George Saxton on his own behalf and on behalf of a Group of Employees (Applicant) v. The Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America (O.P.C.) and its Local 38 (Respondent) v. Marineland of Canada Inc. (Intervener) (*Withdrawn*)

2045-90-R: Bob Kennedy and other employees of Ro-Von Construction Ltd. (Applicants) v. International Union of Operating Engineers, Local 793 (Respondent) v. Ro-Von Construction Ltd. (Intervener)

Unit: "all employees of Ro-Von Construction Limited in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (22 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

2458-90-R: Orla Trudeau (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Atcost Soil Drilling Inc. (Intervener)

Unit: "all employees of the Company working at and out of Concord, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff" (12 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	7

2910-90-R: James Patterson (Applicant) v. Retail, Wholesale & Department Store Union, Local 414 (Respondent) v. Western Inventory Service Ltd. (Intervener) (40 employees in unit) (*Dismissed*)

3308-90-R: Hevac Fireplace-Furnace (Applicant) v. United Steelworkers of America (Respondent) v. Hevac Fireplace Furnace Manufacturing Ltd. (Intervener) (20 employees in unit) (*Dismissed*)

3449-90-R: Donovan Washington Palmer (Applicant) v. Amalgamated Clothing & Textile Workers Union (Respondent) v. Paramount Bedding Upholstery Inc. (Intervener) (*Withdrawn*)

0061-91-R: Pat Morden (Applicant) v. Amalgamated Clothing & Textile Workers Union, Local 1152 (Respondent) v. Bayside Dyeing & Finishing Company Ltd. (Intervener)

Unit: "all employees of the intervener at Trenton, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, security guard, office staff, and students employed during the school vacation period" (12 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	11

0523-91-R: Pauline Korber (Applicant) v. Canadian Union of Public Employees (Respondent) v. The Espanola Board of Education (Intervener) (16 employees in unit) (*Granted*)

0593-91-R: Leslie Norman Thompson (Applicant) v. Teamsters, Local Union No. 879 (Respondent) v. Hamilton Automobile Club (Intervener) (15 employees in unit) (*Dismissed*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

3433-90-M: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America ('The Union') (Trade Union) v. Exhibit & Display Association of Canada ('EDAC'), Rentalex, Exposervice Standard Ltd., Ces Exhibits, Design Craft, Creative Display, Taylor Mfg. Industries Inc., Horizon Exhibits, Designation Ltd., Display and Exhibit Canada Inc., Display Systems Inc., Exposystems Canada Ltd., A Division of McNicol Stevenson Ltd., Giltspur Toronto, G&P Bowie Rentals, ODC Exhibit Systems, Ontario Promotional Services, Panorama/Vago Companies, Quality Exhibits, Scarboro Colour Labs, and Showpiece International (Employers)

UNFAIR LABOUR PRACTICE

1213-88-U: Nicholls-Radtke Limited (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the U.S. and Canada Local 46, and Bill Weatherup (Respondents) (*Dismissed*)

1135-89-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Labourers' International Union of North America, Local 183, The Toronto Housing Labour Bureau, Bramalea Limited, et al, (Respondents) (*Withdrawn*)

1508-89-U: A. Annis, S. Collings, D. Cupples, T. Hunt, R. Thibeault, (Complainants) v. S.E.I.U. (Service Employees' International Union), Local 204, Respondent v. York County Hospital Corporation, Intervener (*Dismissed*)

0903-90-U; 0811-91-U: Michael Kerkman-Gains (Complainant) v. Fisher Gauge Limited (Respondent) v. Independent Union of Precision Diecasters (Intervener) (*Withdrawn*)

1427-90-U: O.P.S.E.U. (A. Hannikainen) (Complainant) v. Northern College of Applied Arts & Technology (Respondent) (*Withdrawn*)

2140-90-U: United Food & Commercial Workers International Union, AFL, CIO, CLC (Complainant) v. Peter Gorman & Sons (Wholesale) Ltd. (Respondent) (*Granted*)

2453-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. DJ's Nepean Taxi Company Limited (Respondent) (*Withdrawn*)

2466-90-U: Bujalski Wtodzimier (Walter) (Complainant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union - Local 231 (AFL:CIO:CLC:) (Respondent) v. American Standard (Intervener) (*Granted*)

2541-90-U: Service Employees' Union, Local 210 (Complainant) v. Heritage Living Centres Ontario Inc. o/a Maplewood Manor Retirement Home (Respondent) (*Withdrawn*)

2610-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Royal Doulton Canada Limited (Respondent) (*Withdrawn*)

2783-90-U: Yahia Mire (Complainant) v. Ontario Taxi Union, Local 1688 RWDSU, AFL:CIO:CLC (Respondents) (*Withdrawn*)

2966-90-U: United Food & Commercial Workers International Union, Local 114P (Complainant) v. Canada Packers Inc. (Respondent) (*Withdrawn*)

2974-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. 470187 Ontario Limited, Known as "Kennedy Apartments", 33 Kennedy Road South, Brampton (Respondent) (*Withdrawn*)

3070-90-U: Mary Scafati (Complainant) v. Loblaws Supermarket Limited and United Food & Commercial Workers International Union, AFL:CIO:CLC, Local 1000A (Respondents) (*Withdrawn*)

3071-90-U: Hannelore Dinoto (Complainant) v. Loblaws Supermarket Limited and United Food & Commercial Workers International Union, AFL:CIO:CLC: Local 1000A (Respondents) (*Withdrawn*)

3142-90-U; 3143-90-U: Tele-Direct (Publications) Inc. (Complainant) v. Syndicat des Employees et Employes Professionnels-les et de Bureau, Section Locale 57, (Respondent) (*Withdrawn*)

3152-90-U: Energy and Chemical Workers Union, Local 593 (Complainant) v. Petro-Canada Products, A Division of Petro-Canada Inc. Lake Ontario Refinery, Mississauga Plant Mississauga, Ontario (Respondent) (*Withdrawn*)

3224-90-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Denos Aluminum Installation Ltd. (Respondent) (*Withdrawn*)

3233-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Ratcliffs/Severn Ltd. (Respondent) (*Withdrawn*)

3316-90-U: Canadian Paperworkers Union (Complainant) v. Holt Rinehart and Winston of Canada, Limited (Respondent) (*Withdrawn*)

3321-90-U: Ivan Gudelj (Complainant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL:CIO:CLC, Local 64 (Respondent) v. Canron Inc. (Intervener) (*Dismissed*)

3358-90-U: Independent Canadian Steelworkers Union (Complainant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Dismissed*)

3369-90-U: United Steelworkers of America (Complainant) v. Wiresmith Ltd. (Respondent) (*Withdrawn*)

3400-90-U: Tim Oribine (Complainant) v. Local 414 of the Retail, Wholesale & Department Store Union, AFL:CIO:CLC; Retail, Wholesale & Department Store Union, AFL:CIO:CLC: Representatives Association of Ontario (Respondent) (*Withdrawn*)

3424-90-U: Daniel Adusei (Complainant) v. Ontario Nurses Association (Local 54) (Respondent) (*Withdrawn*)

0063-91-U: Niagara Health Care & Service Workers Union Local 302 Affiliated with the Christian Labour Association of Canada (Complainant) v. Caduceus Living Centres (Fort Erie) Limited Partnership c.o.b. as Residence on Garrison Rd. (Respondents) (*Withdrawn*)

0074-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 870860 Ontario Limited c.o.b. Bracebridge Villa Retirement Lodge (Respondent) (*Withdrawn*)

0075-91-U: John Patterson (Complainant) v. United Food & Commercial Workers International Union, Local 175 and Great Atlantic & Pacific Company of Canada Limited (Respondent) (*Withdrawn*)

0093-91-U: Energy & Chemical Workers Union, Local 266 (Complainant) v. St. Lawrence Cement Inc., o/a Dufferin Aggregates, Quarry Operation Known as Dufferin Quarry (Respondent) (*withdrawn*)

0135-91-U: International Brotherhood of Electrical Workers, Local 636 (Complainant) v. Chatham Hydro Electric Commission (Respondent) (*Withdrawn*)

0144-91-U: The Township of Charlottenburgh (Complainant) v. CUPE, Local 3089 Office & Clerical Bargaining Unit (Respondent) (*Withdrawn*)

0174-91-U: Sucha Singh Dhillon (Complainant) v. United Steelworkers of America, Local 14831 (Respondent) (*Withdrawn*)

0187-91-U: Octavio V. Marajas (Complainant) v. United Steelworkers of America and Staff Rep. John Fitzpatrick United Steelworkers of America, Local 8505 and these executives, Janet Dunlop (Pres.), Chad Singh (Chief Shop Steward) (Respondents) (*Withdrawn*)

0287-91-U: Service Employees Union, Local 210 (Complainant) v. The Windsor & Essex County Real Estate Board (Respondent) (*Withdrawn*)

0352-91-U: Basil C. Morris (Complainant) v. United Food & Commercial Workers International Union - Loblaws - Toronto, ON, United Food & Commercial Workers International Union - Loblaws - London, On, (Respondent) (*Withdrawn*)

0362-91-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Presstran Industries (Respondent) (*Granted*)

0406-91-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Kehl Tools Ltd. (Respondent) (*Withdrawn*)

0409-91-U: Saulnier Former Bulk Carriers (Complainant) v. Provost Inc. and Energy & Chemical Workers Union (Respondents) (*Withdrawn*)

0423-91-U: Brad Whettlaufer (Complainant) v. United Food & Commercial Workers Local 617P, v. Better Beef Ltd. (Intervener) (*Withdrawn*)

0431-91-U: Alice Louise Edgerton, (Complainant) v. United Food & Commercial Workers International Union and Zehrs Markets A Division of Zehrmart Ltd., and Michael Westman (Respondents) (*Withdrawn*)

0454-91-U: Arlete Amaro (Complainant) v. United Food & Commercial Workers International Union (Respondent) (*Withdrawn*)

0462-91-U: The North York Civic Employees' Union, Local 94, Canadian Union of Public Employees (Complainant) v. The Corporation of the City of North York (Respondent) (*Withdrawn*)

0463-91-U: Independent Union of Precision Diecasters (I.U.P.D.) (Complainant) v. Fisher Gauge Limited (Respondent) (*Withdrawn*)

0491-91-U: Hickeson-Langs Supply Company (Complainant) v. Teamsters Local No. 419, Sam Scrivo and Paul White (Respondents) (*Withdrawn*)

0530-91-U: Canadian Union of Public Employees and its Local 1023 (Complainant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent) (*Withdrawn*)

0539-91-U: Thomas Dennis Goodin (Complainant) v. C.U.P.E., Local 43 and Metro Transportation (Respondent) (*Withdrawn*)

0544-91-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Vandenburg Contracting (1982) Ltd. (Respondent) (*Withdrawn*)

0583-91-U: Hotels, Clubs, Restaurants, Taverns, Employees, Union, Local 261 (Complainant) v. Skyline Hotel Ottawa (Respondent) (*Withdrawn*)

0591-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Community Lifecare Inc. (Respondent) (*Withdrawn*)

0592-91-U: Alice Louise Edgerton (Complainant) v. Zehrs Markets A Division of Zehrmart Ltd. and Michael Westman (Respondents) (*Withdrawn*)

0530-91-U: Canadian Union of Public Employees 1023 (Complainant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent) (*Withdrawn*)

0599-91-U: Mrs. Helen Miskovic, nee Simonovic (Complainant) v. The Queen Elizabeth Hospital (Respondent) (*Withdrawn*)

0601-91-U: United Food & Commercial Workers International Union and United Food & Commercial Workers International Union, Local 1977 (Complainant) v. Loeb IGA Preston (Respondent) (*Withdrawn*)

0645-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Hallmark Hornepayne Centre (Respondent) (*Withdrawn*)

0647-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 900501 Ontario Ltd. c.o.b. as Loeb I.G.A. (Respondent) (*Withdrawn*)

0678-91-U: Hotels, Clubs, Taverns Employees Union, Local 261 (Complainant) v. Delta Ottawa Hotel (Respondent) (*Withdrawn*)

0776-91-U: United Food & Commercial Workers International Union, Local 175/633 (Complainant) v. Sanford IGA (City of Hamilton, Ontario) (Respondent) (*Withdrawn*)

0787-91-U: Fusic Engineering Co. Ltd. (Complainant) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Respondent) (*Dismissed*)

0802-91-U; 0803-91-U: Hotels, Clubs, Taverns Employees Union, Local 261 (Complainant) v. Lorne - Murphy Foods (Cafeterias) (Respondent) (*Withdrawn*)

0832-91-U: Robert James Mically Clock #2216 (Complainant) v. Board of Governors (Respondent) (*Dismissed*)

0866-91-U: Anamet Canada Inc. (Complainant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0384-91-M: Dominion Controls Company Division of Babcock Industries Canada Inc. A Babcock International Company (Applicant) v. International Association of Machinists & Aerospace Workers, Local 1927 (Respondent) (*Dismissed*)

0545-91-M: St. Clair Tool & Die Ltd. (Employer) v. United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., Local 251 (Trade Union) (*Granted*)

0715-91-M: Oxford Pictures Frame Co. Ltd. (Employer) v. International Union of Allied, Novelty, Production Workers, Local 905 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

0012-91-JD: Ontario Sheet Metal Workers' & Roofers' Conference, and Sheet Metal Workers' International Association, Local 473 (Complainants) v. Electrical Power Systems Construction Association, Ontario

Hydro, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3090-90-M: Carleton Place & District Memorial Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

3296-90-M; 3297-90-M: Canadian Union of Public Employees and its Locals 1480 & 1727 (Applicants) v. Frontenac County Board of Education (Respondent) (*Dismissed*)

0160-91-M: Canadian Union of Public Employees, Local 2141 (Applicant) v. The Corporation of the Town of Sioux Lookout (Respondent) (*Dismissed*)

0199-91-M: Canadian Union of Public Employees, Local 778 (Applicant) v. St. Peter's Hospital (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2821-90-OH: Ian Walker (Complainant) v. Filtran Microcircuits Ltd. (Respondent) (*Dismissed*)

0168-91-OH: Mr. Dave Charette (Complainant) v. Mr. Keith Cushnie and Inco Ltd. (Respondents) (*Withdrawn*)

0516-91-OH: Bob Dentrey (Complainant) v. Ford Motor Company of Canada Ltd. (Respondent) (*Withdrawn*)

0540-91-OH: Michael Austin (Complainant) v. Bob White c/o Anchor Investigation Services Inc. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1446-88-G: Nicholls-Radtke Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 and Bill Weatherup (Respondents) (*Dismissed*)

1570-88-G: United Association of Journeymen & Apprentices of the United States & Canada, Local 46 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Dismissed*)

2040-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Konvey Construction Co. Ltd. (Respondent) v. Metropolitan Toronto Apartment Builders Association (Intervener) (*Withdrawn*)

2286-89-G; 2325-90-G: The Ontario Allied Construction Trades Council on behalf of Lake Ontario District Council of United Brotherhood of Carpenters & Joiners of America (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro and Schindler Elevator Corporation (Respondents) v. International Union of Elevators Constructors, Local 50 (Intervener) (*Withdrawn*)

3225-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. King Edward Cabinets (Respondent) (*Withdrawn*)

0108-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Marcantonio Plastering Ltd. (Respondent) (*Withdrawn*)

0408-90-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. E. S. Fox Ltd. (Respondent) (*Withdrawn*)

1662-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Main Rehabilitation Watermain Reconditioning & Cement Mortar Lining Co. Ltd. (Respondent) (*Withdrawn*)

2181-90-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Ottawa Diving Services (111008 Canada Inc.) (Respondent) (*Withdrawn*)

2494-90-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. C.E.D. Group Inc. (Respondent) (*Granted*)

3170-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 833833 Ontario Ltd. c.o.b. as Murphy Construction and Jim McCoy c.o.b. as DBM Construction (Respondents) (*Granted*)

3404-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Curoc Construction (Respondent) (*Withdrawn*)

0007-91-G; 0008-91-G: Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 473 (Applicants) v. Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

0062-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) V. R.J. Nicol Construction (1975) Ltd. (Respondent) (*Withdrawn*)

0132-91-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Neelands Refrigeration Ltd. (Respondent) (*Withdrawn*)

0133-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Freedom Valley Design Inc. (Respondent) (*Granted*)

0275-91-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. J.P.C. Wrecking Ltd. (Respondent) (*Withdrawn*)

0351-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Gillin Engineering & Construction Ltd. (Respondent) (*Withdrawn*)

0363-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Pigott Construction Ltd. (Respondent) (*Withdrawn*)

0398-91-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 25 (Applicant) v. Crittall Construction Ltd. (Respondent) (*Withdrawn*)

0480-91-G: International Brotherhood of Painters & Allied Trades, Local 1819 - Glaziers (Applicant) v. Al McGill Glass & Mirror (Respondent) (*Withdrawn*)

0483-91-G: International Brotherhood of Painters & Allied Trades, Local 1819 - Glaziers (Applicant) v. Skylights Plus (Respondent) (*Withdrawn*)

0488-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Withdrawn*)

0489-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Whyte Glass Ltd. (Respondent) (*Withdrawn*)

- 0490-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Edwards Robert Elect (Respondent) (*Withdrawn*)
- 0494-91-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Losereit Ltd. (Respondent) (*Withdrawn*)
- 0512-91-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Ontario Cutting & Coring (Respondent) (*Withdrawn*)
- 0528-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Nortown Electric Contractors Associates (Respondent) (*Withdrawn*)
- 0549-91-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Conaquip Ltd. (Respondent) (*Withdrawn*)
- 0552-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) Douglas Flooring Ltd. (Respondent) (*Granted*)
- 0566-91-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Copper Cliff Mechanical Construction Ltd. (Respondent) (*Withdrawn*)
- 0568-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Capri Forming Ontario Inc. (Respondent) (*Withdrawn*)
- 0576-91-G:** Bricklayers Union, Local #1 (Applicant) v. A. Gorgi Masonry (Respondent) (*Withdrawn*)
- 0578-91-G:** Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Dunmark Electric Ltd. (Respondent) (*Withdrawn*)
- 0580-91-G:** Christian Labour Association of Canada (Applicant) v. Pro Electric Inc. (Respondent) (*Withdrawn*)
- 0581-91-G:** Labourers' International Union of North America, Local 493 (Applicant) v. R. M. Belanger Construction Ltd. (Respondent) (*Granted*)
- 0589-91-G:** International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)
- 0594-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Barclay Tile & Carpet (Respondent) (*Withdrawn*)
- 0595-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. R & R Projects Inc. (Respondent) (*Granted*)
- 0596-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Calibre Enterprises Ltd. (Respondent) (*Withdrawn*)
- 0608-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Granted*)
- 0614-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Colosimo Contracting Ltd. (Respondent) (*Granted*)
- 0615-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (*Granted*)

0616-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Drainex Construction Ltd. (Respondent) (*Granted*)

0617-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Targa Ltd. (Respondent) (*Granted*)

0618-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Westwood Drain Co. Ltd. (Respondent) (*Granted*)

0625-91-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. T.C. Erectors (Respondent) (*Withdrawn*)

0628-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Pigott Construction Ltd. (Respondent) (*Withdrawn*)

0633-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Durso Steel Ltd. (Respondent) (*Granted*)

0640-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. P. Cipriano Construction Ltd. c.o.b. as Goldpark Estates (Respondent) (*Granted*)

0661-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Globe Excavating & Grading Ltd. (Respondent) (*Withdrawn*)

0668-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mark O'Connor Disposal Demolition Ltd. (Respondent) (*Withdrawn*)

0670-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sala Electric Ltd., Sala Electric Inc., G.T.G. Electric Ltd. & Norbet Electric Ltd. (Respondents) (*Granted*)

0679-91-G; 0680-91-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Gall Construction Ltd. o/a Acapulco Recreational Contractors (Respondent) (*Withdrawn*)

0692-91-G: Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. 726846 Ontario Ltd. c.o.b. as Versatile Contracting (Respondent) (*Granted*)

0700-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Withdrawn*)

0703-91-G: Christian Labour Association of Canada (Applicant) v. Marlee Electric Company Ltd. (Respondent) (*Withdrawn*)

0710-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Pellerin Construction Inc. (Respondent) (*Granted*)

0724-91-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Continental Masonry Ltd. (Respondent) (*Granted*)

0728-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Duron Ontario Ltd. (Respondent) (*Withdrawn*)

0731-91-G: Labourers' International Union of North America, Local 607 (Applicant) v. 539711 Ontario Ltd. o/a Sentinel Contracting Ltd. (Respondent) (*Granted*)

0747-91-G: Labourers' International Union of North America, Local 1081 (Applicant) v. G.M. Gest Ltd. (Respondent) (*Withdrawn*)

0760-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Powercable Installations (Toronto) Ltd. (Respondent) (*Withdrawn*)

0775-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 845288 Ontario Ltd. c.o.b. as Kayal Construction (Respondent) (*Granted*)

0795-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Twinborne Construction (Paving) Ltd. (Respondent) (*Withdrawn*)

0809-91-G: Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Rockford Tile Contractors Ltd. (Respondent) (*Withdrawn*)

0810-91-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Fly Form Structures Inc. (Respondent) (*Withdrawn*)

0818-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. B. Gerlach & Son Enterprises Inc. (Respondent) (*Granted*)

0823-91-G: Labourers' International Union of North America, Local 493 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. A. Corsie Masonry Ltd. (Respondent) (*Granted*)

0826-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. M.P. Lundy Construction Ltd. (Respondent) (*Withdrawn*)

0827-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fermar Paving Ltd. (Respondent) (*Granted*)

0835-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Forest Heights (Aurora) Inc. (Respondent) (*Withdrawn*)

0906-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. West Front Construction Ltd. (Respondent) (*Withdrawn*)

0908-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Adelaide Electric (Respondent) (*Withdrawn*)

0920-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) Ryco-Robertston Yates Corp. Ltd. (Respondent) (*Withdrawn*)

0921-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Mississauga Cement Forming Ltd. (Respondent) (*Withdrawn*)

0928-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. G. C. Tech Electrical (Respondent) (*Withdrawn*)

0935-91-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 666 (Applicant) v. Janzen Plumbing & Heating Ltd. (Respondent) (*Granted*)

0943-91-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Selco Elevator (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2609-90-U: Jack Hallowell (Complainant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Perfect Metro Cleaners Ltd. (Intervener) (*Dismissed*)

RIGHT OF ACCESS

0586-91-M: International Union of Operating Engineers, Local 793 (Applicant) v. J. S. Sigfusson & Sons Ltd. (Respondent) (*Granted*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

CADON
LR
- 0 54

Government
Publications

ONTARIO LABOUR RELATIONS BOARD REPORTS

August 1991



Ontario

ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	M.G. MITCHNICK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	M. BENDEL
	L. DAVIE
	N.V. DISSANAYAKE
	O.V. GRAY
	R.J. HERMAN
	B. HERLICH
	R.D. HOWE
	J. JOHNSTON
	B. KELLER
	P. KNOPF
	J. McCORMACK
	M.A. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	I.M. STAMP
	G. SURDYKOWSKI
	S.A. TACON

Members

J. ANDERSON	J.W. MURRAY
B.L. ARMSTRONG	W.S. O'NEILL
C.A. BALLENTINE	D.A. PATTERSON
W.A. CORRELL	H. PEACOCK
K.S. DAVIES	R.W. PIRRIE
A.R. FOUCAULT	J. REDSHAW
W.N. FRASER	K.V. ROGERS
P.V. GRASSO	J.A. RONSON
A. HERSHKOVITZ	M.A. ROSS
M. JONES	J.A. RUNDLE
F. KELLY	G.O. SHAMANSKI
J. KENNEDY	R.M. SLOAN
H. KOBRYN	E.G. THEOBALD
J. KURCHAK	J. TRIM
J. LEAR	M. VUKOBRAT
D.A. MacDONALD	S. WESLAK
W.J. McCARRON	W.H. WIGHTMAN
C. McDONALD	N.A. WILSON
R.D. McMURDO	D.G. WOZNIAK
R.R. MONTAGUE	

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	K. HEWSON
	R. LEBI
	K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1991] OLRB REP. AUGUST

EDITOR: RON LEBI

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1. Booth Fisheries, 176218 Canada Inc. c.o.b., and Van Horne Fish Distributors Ontario Ltd., and 167100 Canada Inc. c.o.b. as Groupe La Mer; Re Teamsters, Local 419	947
2. Carecor Health Services Inc., Baycrest Hospital, Centenary Hospital, Central Hospital, Clarke Institute of Psychiatry, Donwood Institute, Etobicoke General Hospital, Hillcrest Hospital, Humber Memorial Hospital, Lyndhurst Hospital, Mount Sinai Hospital, North York General Hospital, Northwestern General Hospital, Princess Margaret Hospital, Providence Villa and Hospital, Queen Elizabeth Hospital, Queensway General Hospital, Scarborough General Hospital, St. Joseph's Health Centre, St. Michael's Hospital, Sunnybrook Medical Centre, Toronto East General Orthopaedic Hospital, Toronto General Hospital, Toronto Western Hospital, Wellesley Hospital, West Park Hospital, Women's College Hospital, York-Finch General Hospital; Re O.N.A.	957
3. Carecor Security Service Inc.; Re U.P.G.W.A., Local 1962.....	962
4. Craven, John; Re B.B.F., Local 128	969
5. F.H.R. Construction Ltd.; Re I.U.O.E., Local 793; Re Raymond Thibault	977
6. Foster Wheeler Limited, L.I.U.N.A., Local 1089 and; Re B.B.F., Local 128; Re Metropolitan Toronto Demolition Contractors Association.....	990
7. J.M.R. Electric Ltd.; Re S.M.W., Local 473	996
8. J.R. Mechanical Inc.; Re Ontario Sheet Metal Workers' Conference and S.M.W., Local 30; Re U.A., Local 46; Re Ontario Sheet Metal and Air Handling Group.....	999
9. Ridge Landfill Corporation; Re U.F.C.W., Local 175; Re Group of Employees.....	1002
10. Shelburne Residence; Re O.N.A.; Re S.E.I.U., Local 204 (Affiliated with the A.F. of L., C.I.O., C.L.C.)	1005
11. Spackman, David A.; Re C.A.W., and C.A.W., Local 222	1006
12. Toyota Canada Inc.; Re C.A.W.	1011
13. Tycos Tool & Die, Conix Canada Inc. c.o.b. as; Re U.S.W.A.; Re Group of Employees	1013
14. U.F.C.W., Locals 175/633; Re E.C.W.U.; Re John Clark	1016
15. Waylok Air Conditioning Limited; Re U.A., Locals 463 and 599	1016

SUBJECT INDEX

- Bargaining Unit - Certification - Evidence - Nurses' union making displacement application and seeking to carve out its standard nurses unit from existing all-employee bargaining unit - Board finding no extenuating factors which would cause it to depart from the usual practice in displacement applications - Board declining to hear evidence of external comparisons of wages and benefits - Bargaining unit applied for held not an appropriate unit - Application dismissed
- SHELBURNE RESIDENCE; RE O.N.A.; RE S.E.I.U., LOCAL 204 (AFFILIATED WITH THE A.F. OF L., C.I.O., C.L.C.)..... 1005
- Bargaining Unit - Certification - Pre-Hearing Vote - Board, in earlier decision, finding union's proposed unit appropriate and directing that ballots cast by employees in that unit be counted - Employer objecting to counting ballots - Board rejecting employer argument that certain employees who were not employed in the bargaining unit on the application date should have their ballots counted because these employees subsequently came within the bargaining unit - Board directing the counting of the ballots in accordance with its earlier decision
- TOYOTA CANADA INC.; RE C.A.W. 1013
- Bargaining Unit - Certification - Security Guard - Employer security firm holding contracts with nine hospitals within Metropolitan Toronto - Union seeking site specific bargaining unit for guards at single hospital - Employer proposing municipal unit - No evidence of substantial interchange of employees between facilities - Board finding union's proposed unit appropriate - Certificate issuing
- CARECOR SECURITY SERVICE INC.; RE U.P.G.W.A., LOCAL 1962 962
- Bargaining Unit - Construction Industry - Termination - Union submitting that termination application be dismissed because it had not been brought by or on behalf of the "employees in the bargaining unit defined in [the] collective agreement" as required by section 57(2) of the *Act* - Board considering principle in *April Waterproofing Ltd.* decision and finding it inapplicable to circumstances of the case - Representation vote ordered
- F.H.R. CONSTRUCTION LTD.; RE I.U.O.E., LOCAL 793; RE RAYMOND THIBAUT..... 977
- Certification - Bargaining Unit - Evidence - Nurses' union making displacement application and seeking to carve out its standard nurses unit from existing all-employee bargaining unit - Board finding no extenuating factors which would cause it to depart from the usual practice in displacement applications - Board declining to hear evidence of external comparisons of wages and benefits - Bargaining unit applied for held not an appropriate unit - Application dismissed
- SHELBURNE RESIDENCE; RE O.N.A.; RE S.E.I.U., LOCAL 204 (AFFILIATED WITH THE A.F. OF L., C.I.O., C.L.C.)..... 1005
- Certification - Bargaining Unit - Pre-Hearing Vote - Board, in earlier decision, finding union's proposed unit appropriate and directing that ballots cast by employees in that unit be counted - Employer objecting to counting ballots - Board rejecting employer argument that certain employees who were not employed in the bargaining unit on the application date should have their ballots counted because these employees subsequently came within the bargaining unit - Board directing the counting of the ballots in accordance with its earlier decision
- TOYOTA CANADA INC.; RE C.A.W. 1013

II

Certification - Bargaining Unit - Security Guard - Employer security firm holding contracts with nine hospitals within Metropolitan Toronto - Union seeking site specific bargaining unit for guards at single hospital - Employer proposing municipal unit - No evidence of substantial interchange of employees between facilities - Board finding union's proposed unit appropriate - Certificate issuing	
CARECOR SECURITY SERVICE INC.; RE U.P.G.W.A., LOCAL 1962	962
Certification - Construction Industry - Evidence - Membership Evidence - Certification applications in ICI sector made in name of union's local 463 and local 599 - In support of applications, applicants submitting membership evidence, including evidence of membership in union's local 46 - Evidence of membership in local 46 held not evidence of membership in either local 463 or local 599 - Applications dismissed	
WAYLOK AIR CONDITIONING LIMITED; RE U.A., LOCALS 463 AND 599.....	1016
Certification - Form 6 posted for 2½ days before expiry of terminal date - Whether posting period of 2½ days inadequate - Board denying objecting employee's request for extension of terminal date - Certificate issuing	
RIDGE LANDFILL CORPORATION; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES	1002
Certification - Practice and Procedure - Unfair Labour Practice - Board consolidating union's application for certification and unfair labour practice complaint - Union counsel estimating ten hearing days could be required to complete the two matters - Board offering twenty-nine dates before the end of January 1992 - Of eighteen dates in 1991 canvassed, parties' counsel all available on only one - Board setting ten dates in 1991 without regard to achieving consensus among the parties	
TYCOS TOOL & DIE, CONIX CANADA INC. C.O.B. AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES	1013
Construction Industry - Bargaining Unit - Termination - Union submitting that termination application be dismissed because it had not been brought by or on behalf of the "employees in the bargaining unit defined in [the] collective agreement" as required by section 57(2) of the <i>Act</i> - Board considering principle in <i>April Waterproofing Ltd.</i> decision and finding it inapplicable to circumstances of the case - Representation vote ordered	
F.H.R. CONSTRUCTION LTD.; RE I.U.O.E., LOCAL 793; RE RAYMOND THIBAUT	977
Construction Industry - Certification - Evidence - Membership Evidence - Certification applications in ICI sector made in name of union's local 463 and local 599 - In support of applications, applicants submitting membership evidence, including evidence of membership in union's local 46 - Evidence of membership in local 46 held not evidence of membership in either local 463 or local 599 - Applications dismissed	
WAYLOK AIR CONDITIONING LIMITED; RE U.A., LOCALS 463 AND 599.....	1016
Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Settlement - Employer filing jurisdictional dispute complaint as defence to grievance filed by Sheet metal workers union - Employer and Sheet metal workers subsequently settling complaint and seeking leave to withdraw grievance and complaint - Plumbers union not a party to the settlement and submitting that Board ought not to permit employer to withdraw the jurisdictional dispute complaint - Board adopting rationale in	

E.S. Fox case and concluding that it ought not inquire further into the complaint - Leave to withdraw granted

J.R. MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' CONFERENCE AND S.M.W., LOCAL 30; RE U.A., LOCAL 46; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP 999

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Board dealing with preliminary matters including parameters of area past practice evidence - Board declining to hear *viva voce* evidence about evidence sought to be introduced in hearing of merits - Board determined to "draw the line" to evidence which relates to or can be tied to the actual work in dispute - Evidence sought to be adduced by Labourers ruled not relevant

FOSTER WHEELER LIMITED, L.I.U.N.A., LOCAL 1089 AND; RE B.B.F., LOCAL 128; RE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION 990

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Settlement - Employer filing jurisdictional dispute complaint as defence to grievance filed by Sheet metal workers union - Employer and Sheet metal workers subsequently settling complaint and seeking leave to withdraw grievance and complaint - Plumbers union not a party to the settlement and submitting that Board ought not to permit employer to withdraw the jurisdictional dispute complaint - Board adopting rationale in *E.S. Fox* case and concluding that it ought not inquire further into the complaint - Leave to withdraw granted

J.R. MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' CONFERENCE AND S.M.W., LOCAL 30; RE U.A., LOCAL 46; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP 999

Duty of Fair Representation - Practice and Procedure - Remedies - Unfair Labour Practice - Union settling grievance rather than pursuing matter to arbitration - Complainant not given promised opportunity to make representations to union's executive board - Union neither appearing at Board hearing, nor filing reply to complaint - Employer not named in complaint and taking no part in proceeding - In absence of explanation from union, Board finding *prima facie* case of breach of fair representation duty made out - Complaint upheld - No entitlement to financial compensation established - Union directed to provide detailed written explanation for settling complainant's grievance

SPACKMAN, DAVID A.; RE C.A.W., AND C.A.W., LOCAL 222 1006

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Complainant alleging bad faith in settling grievance against former employer - Union denying bad faith - Union also pleading delay and arguing that any Board inquiry would be expensive and entirely academic exercise from which complainant could derive no tangible benefit - Board declining to inquire further into complaint - Complaint dismissed

CRAVEN, JOHN; RE B.B.F., LOCAL 128 969

Employee Reference - Practice and Procedure - Related Employer - Unfair Labour Practice - Board ruling on various preliminary and/or procedural matters - Board adjourning union's s.106(2) application and dismissing its s.89 complaint in part - Board directing that union's s.1(4) application and s.89 complaint proceed together and that they be pre-heard together - Board declining to defer to arbitration and concluding that dispute raises important labour

IV

relations, public policy and legal issues - Union directed to provide additional particulars and to specify relief sought

CARECOR HEALTH SERVICES INC., BAYCREST HOSPITAL, CENTENARY HOSPITAL, CENTRAL HOSPITAL, CLARKE INSTITUTE OF PSYCHIATRY, DONWOOD INSTITUTE, ETOBICOKE GENERAL HOSPITAL, HILLCREST HOSPITAL, HUMBER MEMORIAL HOSPITAL, LYNDHURST HOSPITAL, MOUNT SINAI HOSPITAL, NORTH YORK GENERAL HOSPITAL, NORTHWESTERN GENERAL HOSPITAL, PRINCESS MARGARET HOSPITAL, PROVIDENCE VILLA AND HOSPITAL, QUEEN ELIZABETH HOSPITAL, QUEENSWAY GENERAL HOSPITAL, SCARBOROUGH GENERAL HOSPITAL, ST. JOSEPH'S HEALTH CENTRE, ST. MICHAEL'S HOSPITAL, SUNNYBROOK MEDICAL CENTRE, TORONTO EAST GENERAL ORTHOPAEDIC HOSPITAL, TORONTO GENERAL HOSPITAL, TORONTO WESTERN HOSPITAL, WELLESLEY HOSPITAL, WEST PARK HOSPITAL, WOMEN'S COLLEGE HOSPITAL, YORK-FINCH GENERAL HOSPITAL; RE O.N.A.

957

Evidence - Bargaining Unit - Certification - Nurses' union making displacement application and seeking to carve out its standard nurses unit from existing all-employee bargaining unit - Board finding no extenuating factors which would cause it to depart from the usual practice in displacement applications - Board declining to hear evidence of external comparisons of wages and benefits - Bargaining unit applied for held not an appropriate unit - Application dismissed

SHELBURNE RESIDENCE; RE O.N.A.; RE S.E.I.U., LOCAL 204 (AFFILIATED WITH THE A.F. OF L., C.I.O., C.L.C.).....

1005

Evidence - Certification - Construction Industry - Membership Evidence - Certification applications in ICI sector made in name of union's local 463 and local 599 - In support of applications, applicants submitting membership evidence, including evidence of membership in union's local 46 - Evidence of membership in local 46 held not evidence of membership in either local 463 or local 599 - Applications dismissed

WAYLOK AIR CONDITIONING LIMITED; RE U.A., LOCALS 463 AND 599.....

1016

Evidence - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board dealing with preliminary matters including parameters of area past practice evidence - Board declining to hear *viva voce* evidence about evidence sought to be introduced in hearing of merits - Board determined to "draw the line" to evidence which relates to or can be tied to the actual work in dispute - Evidence sought to be adduced by Labourers ruled not relevant

FOSTER WHEELER LIMITED, L.I.U.N.A., LOCAL 1089 AND; RE B.B.F., LOCAL 128; RE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION

990

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Practice and Procedure - Settlement - Employer filing jurisdictional dispute complaint as defence to grievance filed by Sheet metal workers union - Employer and Sheet metal workers subsequently settling complaint and seeking leave to withdraw grievance and complaint - Plumbers union not a party to the settlement and submitting that Board ought not to permit employer to withdraw the jurisdictional dispute complaint - Board adopting rationale in *E.S. Fox* case and concluding that it ought not inquire further into the complaint - Leave to withdraw granted

J.R. MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' CONFERENCE AND S.M.W., LOCAL 30; RE U.A., LOCAL 46; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP

999

Jurisdictional Dispute - Construction Industry - Evidence - Practice and Procedure - Board deal-

ing with preliminary matters including parameters of area past practice evidence - Board declining to hear *viva voce* evidence about evidence sought to be introduced in hearing of merits - Board determined to “draw the line” to evidence which relates to or can be tied to the actual work in dispute - Evidence sought to be adduced by Labourers ruled not relevant

FOSTER WHEELER LIMITED, L.I.U.N.A., LOCAL 1089 AND; RE B.B.F., LOCAL 128; RE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION 990

Membership Evidence - Certification - Construction Industry - Evidence - Certification applications in ICI sector made in name of union’s local 463 and local 599 - In support of applications, applicants submitting membership evidence, including evidence of membership in union’s local 46 - Evidence of membership in local 46 held not evidence of membership in either local 463 or local 599 - Applications dismissed

WAYLOK AIR CONDITIONING LIMITED; RE U.A., LOCALS 463 AND 599 1016

Practice and Procedure - Certification - Unfair Labour Practice - Board consolidating union’s application for certification and unfair labour practice complaint - Union counsel estimating ten hearing days could be required to complete the two matters - Board offering twenty-nine dates before the end of January 1992 - Of eighteen dates in 1991 canvassed, parties’ counsel all available on only one - Board setting ten dates in 1991 without regard to achieving consensus among the parties

TYCOS TOOL & DIE, CONIX CANADA INC. C.O.B. AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES 1013

Practice and Procedure - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Settlement - Employer filing jurisdictional dispute complaint as defence to grievance filed by Sheet metal workers union - Employer and Sheet metal workers subsequently settling complaint and seeking leave to withdraw grievance and complaint - Plumbers union not a party to the settlement and submitting that Board ought not to permit employer to withdraw the jurisdictional dispute complaint - Board adopting rationale in *E.S. Fox* case and concluding that it ought not inquire further into the complaint - Leave to withdraw complaint and grievance granted

J.R. MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS’ CONFERENCE AND S.M.W., LOCAL 30; RE U.A., LOCAL 46; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP 999

Practice and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Board dealing with preliminary matters including parameters of area past practice evidence - Board declining to hear *viva voce* evidence about evidence sought to be introduced in hearing of merits - Board determined to “draw the line” to evidence which relates to or can be tied to the actual work in dispute - Evidence sought to be adduced by Labourers ruled not relevant

FOSTER WHEELER LIMITED, L.I.U.N.A., LOCAL 1089 AND; RE B.B.F., LOCAL 128; RE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION 990

Practice and Procedure - Duty of Fair Representation - Remedies - Unfair Labour Practice - Union settling grievance rather than pursuing matter to arbitration - Complainant not given promised opportunity to make representations to union’s executive board - Union neither appearing at Board hearing, nor filing reply to complaint - Employer not named in complaint and taking no part in proceeding - In absence of explanation from union, Board finding *prima facie* case of breach of fair representation duty made out - Complaint upheld - No entitlement to financial compensation established - Union directed to provide detailed written explanation for settling complainant’s grievance

SPACKMAN, DAVID A.; RE C.A.W., AND C.A.W., LOCAL 222 1006

VI

Practice and Procedure - Duty of Fair Representation - Unfair Labour Practice - Complainant alleging bad faith in settling grievance against former employer - Union denying bad faith - Union also pleading delay and arguing that any Board inquiry would be expensive and entirely academic exercise from which complainant could derive no tangible benefit - Board declining to inquire further into complaint - Complaint dismissed

CRAVEN, JOHN; RE B.B.F., LOCAL 128 969

Practice and Procedure - Employee Reference - Related Employer - Unfair Labour Practice - Board ruling on various preliminary and/or procedural matters - Board adjourning union's s.106(2) application and dismissing its s.89 complaint in part - Board directing that union's s.1(4) application and s.89 complaint proceed together and that they be pre-heard together - Board declining to defer to arbitration and concluding that dispute raises important labour relations, public policy and legal issues - Union directed to provide additional particulars and to specify relief sought

CARECOR HEALTH SERVICES INC., BAYCREST HOSPITAL, CENTENARY HOSPITAL, CENTRAL HOSPITAL, CLARKE INSTITUTE OF PSYCHIATRY, DONWOOD INSTITUTE, ETOBICOKE GENERAL HOSPITAL, HILLCREST HOSPITAL, HUMBER MEMORIAL HOSPITAL, LYNTHURST HOSPITAL, MOUNT SINAI HOSPITAL, NORTH YORK GENERAL HOSPITAL, NORTHWESTERN GENERAL HOSPITAL, PRINCESS MARGARET HOSPITAL, PROVIDENCE VILLA AND HOSPITAL, QUEEN ELIZABETH HOSPITAL, QUEENSWAY GENERAL HOSPITAL, SCARBOROUGH GENERAL HOSPITAL, ST. JOSEPH'S HEALTH CENTRE, ST. MICHAEL'S HOSPITAL, SUNNYBROOK MEDICAL CENTRE, TORONTO EAST GENERAL ORTHOPAEDIC HOSPITAL, TORONTO GENERAL HOSPITAL, TORONTO WESTERN HOSPITAL, WELLESLEY HOSPITAL, WEST PARK HOSPITAL, WOMEN'S COLLEGE HOSPITAL, YORK-FINCH GENERAL HOSPITAL; RE O.N.A. 957

Practice and Procedure - Unfair Labour Practice - Grievor asking that his name be substituted for that of union as complainant in unfair labour practice complaint - Complainant union not present or represented at hearing - Employer objecting to substitution - Board denying grievor's request - In absence of complainant to prosecute complaint, Board dismissing complaint

U.F.C.W., LOCALS 175/633; RE E.C.W.U.; RE JOHN CLARK 1016

Pre-Hearing Vote - Bargaining Unit - Certification - Board, in earlier decision, finding union's proposed unit appropriate and directing that ballots cast by employees in that unit be counted - Employer objecting to counting ballots - Board rejecting employer argument that certain employees who were not employed in the bargaining unit on the application date should have their ballots counted because these employees subsequently came within the bargaining unit - Board directing the counting of the ballots in accordance with its earlier decision

TOYOTA CANADA INC.; RE C.A.W. 1011

Related Employer - Employee Reference - Practice and Procedure - Unfair Labour Practice - Board ruling on various preliminary and/or procedural matters - Board adjourning union's s.106(2) application and dismissing its s.89 complaint in part - Board directing that union's s.1(4) application and s.89 complaint proceed together and that they be pre-heard together - Board declining to defer to arbitration and concluding that dispute raises important labour

relations, public policy and legal issues - Union directed to provide additional particulars and to specify relief sought

CARECOR HEALTH SERVICES INC., BAYCREST HOSPITAL, CENTENARY HOSPITAL, CENTRAL HOSPITAL, CLARKE INSTITUTE OF PSYCHIATRY, DONWOOD INSTITUTE, ETOBICOKE GENERAL HOSPITAL, HILLCREST HOSPITAL, HUMBER MEMORIAL HOSPITAL, LYNTHURST HOSPITAL, MOUNT SINAI HOSPITAL, NORTH YORK GENERAL HOSPITAL, NORTHWESTERN GENERAL HOSPITAL, PRINCESS MARGARET HOSPITAL, PROVIDENCE VILLA AND HOSPITAL, QUEEN ELIZABETH HOSPITAL, QUEENSWAY GENERAL HOSPITAL, SCARBOROUGH GENERAL HOSPITAL, ST. JOSEPH'S HEALTH CENTRE, ST. MICHAEL'S HOSPITAL, SUNNYBROOK MEDICAL CENTRE, TORONTO EAST GENERAL ORTHOPAEDIC HOSPITAL, TORONTO GENERAL HOSPITAL, TORONTO WESTERN HOSPITAL, WELLESLEY HOSPITAL, WEST PARK HOSPITAL, WOMEN'S COLLEGE HOSPITAL, YORK-FINCH GENERAL HOSPITAL; RE O.N.A.

957

Related Employer - Remedies - Sale of a Business - Three companies part of family business owned and controlled by single individual - All three companies involved in distribution of fish products and, therefore, of the same "character" - Board finding erosion of union's bargaining rights - Related employer declaration issuing - Board rejecting companies' request that any remedial relief be prospective only - In circumstances, Board finding it unnecessary to direct attention to applications alleging sale of business

BOOTH FISHERIES, 176218 CANADA INC. C.O.B., AND VAN HORNE FISH DISTRIBUTORS ONTARIO LTD., AND 167100 CANADA INC. C.O.B. AS GROUPE LA MER; RE TEAMSTERS, LOCAL 419

947

Remedies - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Union settling grievance rather than pursuing matter to arbitration - Complainant not given promised opportunity to make representations to union's executive board - Union neither appearing at Board hearing, nor filing reply to complaint - Employer not named in complaint and taking no part in proceeding - In absence of explanation from union, Board finding *prima facie* case of breach of fair representation duty made out - Complaint upheld - No entitlement to financial compensation established - Union directed to provide detailed written explanation for settling complainant's grievance

SPACKMAN, DAVID A.; RE C.A.W., AND C.A.W., LOCAL 222

1006

Remedies - Related Employer - Sale of a Business - Three companies part of family business owned and controlled by single individual - All three companies involved in distribution of fish products and, therefore, of the same "character" - Board finding erosion of union's bargaining rights - Related employer declaration issuing - Board rejecting companies' request that any remedial relief be prospective only - In circumstances, Board finding it unnecessary to direct attention to applications alleging sale of business

BOOTH FISHERIES, 176218 CANADA INC. C.O.B., AND VAN HORNE FISH DISTRIBUTORS ONTARIO LTD., AND 167100 CANADA INC. C.O.B. AS GROUPE LA MER; RE TEAMSTERS, LOCAL 419

947

Remedies - Unfair Labour Practice - Employer refusing to permit grievors to participate in hiring process because of their union membership - Complaint upheld - Matter of remedy remitted back to the parties for resolution

J.M.R. ELECTRIC LTD.; RE S.M.W., LOCAL 473

996

Sale of a Business - Related Employer - Remedies - Three companies part of family business owned and controlled by single individual - All three companies involved in distribution of fish products and, therefore, of the same "character" - Board finding erosion of union's

VIII

bargaining rights - Related employer declaration issuing - Board rejecting companies' request that any remedial relief be prospective only - In circumstances, Board finding it unnecessary to direct attention to applications alleging sale of business

BOOTH FISHERIES, 176218 CANADA INC. C.O.B., AND VAN HORNE FISH DISTRIBUTORS ONTARIO LTD., AND 167100 CANADA INC. C.O.B. AS GROUPE LA MER; RE TEAMSTERS, LOCAL 419 947

Security Guard - Bargaining Unit - Certification - Employer security firm holding contracts with nine hospitals within Metropolitan Toronto - Union seeking site specific bargaining unit for guards at single hospital - Employer proposing municipal unit - No evidence of substantial interchange of employees between facilities - Board finding union's proposed unit appropriate - Certificate issuing

CARECOR SECURITY SERVICE INC.; RE U.P.G.W.A., LOCAL 1962 962

Settlement - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Employer filing jurisdictional dispute complaint as defence to grievance filed by Sheet metal workers union - Employer and Sheet metal workers subsequently settling complaint and seeking leave to withdraw grievance and complaint - Plumbers union not a party to the settlement and submitting that Board ought not to permit employer to withdraw the jurisdictional dispute complaint - Board adopting rationale in *E.S. Fox* case and concluding that it ought not inquire further into the complaint - Leave to withdraw granted

J.R. MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' CONFERENCE AND S.M.W., LOCAL 30; RE U.A., LOCAL 46; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP 999

Termination - Bargaining Unit - Construction Industry - Union submitting that termination application be dismissed because it had not been brought by or on behalf of the "employees in the bargaining unit defined in [the] collective agreement" as required by section 57(2) of the *Act* - Board considering principle in *April Waterproofing Ltd.* decision and finding it inapplicable to circumstances of the case - Representation vote ordered

F.H.R. CONSTRUCTION LTD.; RE I.U.O.E., LOCAL 793; RE RAYMOND THIBAUT 977

Unfair Labour Practice - Certification - Practice and Procedure - Board consolidating union's application for certification and unfair labour practice complaint - Union counsel estimating ten hearing days could be required to complete the two matters - Board offering twenty-nine dates before the end of January 1992 - Of eighteen dates in 1991 canvassed, parties' counsel all available on only one - Board setting ten dates in 1991 without regard to achieving consensus among the parties

TYCOS TOOL & DIE, CONIX CANADA INC. C.O.B. AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES 1013

Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Remedies - Union settling grievance rather than pursuing matter to arbitration - Complainant not given promised opportunity to make representations to union's executive board - Union neither appearing at Board hearing, nor filing reply to complaint - Employer not named in complaint and taking no part in proceeding - In absence of explanation from union, Board finding *prima facie* case of breach of fair representation duty made out - Complaint upheld - No entitlement to financial compensation established - Union directed to provide detailed written explanation for settling complainant's grievance

SPACKMAN, DAVID A.; RE C.A.W., AND C.A.W., LOCAL 222 1006

Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Complainant

alleging bad faith in settling grievance against former employer - Union denying bad faith - Union also pleading delay and arguing that any Board inquiry would be expensive and entirely academic exercise from which complainant could derive no tangible benefit - Board declining to inquire further into complaint - Complaint dismissed

CRAVEN, JOHN; RE B.B.F., LOCAL 128 969

Unfair Labour Practice - Employee Reference - Practice and Procedure - Related Employer - Board ruling on various preliminary and/or procedural matters - Board adjourning union's s.106(2) application and dismissing its s.89 complaint in part - Board directing that union's s.1(4) application and s.89 complaint proceed together and that they be pre-heard together - Board declining to defer to arbitration and concluding that dispute raises important labour relations, public policy and legal issues - Union directed to provide additional particulars and to specify relief sought

CARECOR HEALTH SERVICES INC., BAYCREST HOSPITAL, CENTENARY HOSPITAL, CENTRAL HOSPITAL, CLARKE INSTITUTE OF PSYCHIATRY, DONWOOD INSTITUTE, ETOBICOKE GENERAL HOSPITAL, HILLCREST HOSPITAL, HUMBER MEMORIAL HOSPITAL, LYNDHURST HOSPITAL, MOUNT SINAI HOSPITAL, NORTH YORK GENERAL HOSPITAL, NORTHWESTERN GENERAL HOSPITAL, PRINCESS MARGARET HOSPITAL, PROVIDENCE VILLA AND HOSPITAL, QUEEN ELIZABETH HOSPITAL, QUEENSWAY GENERAL HOSPITAL, SCARBOROUGH GENERAL HOSPITAL, ST. JOSEPH'S HEALTH CENTRE, ST. MICHAEL'S HOSPITAL, SUNNYBROOK MEDICAL CENTRE, TORONTO EAST GENERAL ORTHOPAEDIC HOSPITAL, TORONTO GENERAL HOSPITAL, TORONTO WESTERN HOSPITAL, WELLESLEY HOSPITAL, WEST PARK HOSPITAL, WOMEN'S COLLEGE HOSPITAL, YORK-FINCH GENERAL HOSPITAL; RE O.N.A. 957

Unfair Labour Practice - Practice and Procedure - Grievor asking that his name be substituted for that of union as complainant in unfair labour practice complaint - Complainant union not present or represented at hearing - Employer objecting to substitution - Board denying grievor's request - In absence of complainant to prosecute complaint, Board dismissing complaint

U.F.C.W., LOCALS 175/633; RE E.C.W.U.; RE JOHN CLARK 1016

Unfair Labour Practice - Remedies - Employer refusing to permit grievors to participate in hiring process because of their union membership - Complaint upheld - Matter of remedy remitted back to the parties for resolution

J.M.R. ELECTRIC LTD.; RE S.M.W., LOCAL 473 996

0144-90-R; 0145-90-R; 2050-90-R; 2051-90-R Teamsters, Local 419, Applicant v. 176218 Canada Inc. c.o.b. **Booth Fisheries**; and Van Horne Fish Distributors Ontario Ltd., Respondents; Teamsters Local 419, Applicant v. 176218 Canada Inc. c.o.b. as Booth Fisheries; Van Horne Fish Distributors Ontario Ltd.; and 167100 Canada Inc. c.o.b. as Groupe La Mer, Respondents

Related Employer - Remedies - Sale of a Business - Three companies part of family business owned and controlled by single individual - All three companies involved in distribution of fish products and, therefore, of the same "character" - Board finding erosion of union's bargaining rights - Related employer declaration issuing - Board rejecting companies' request that any remedial relief be prospective only - In circumstances, Board finding it unnecessary to direct attention to applications alleging sale of business

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

APPEARANCES: *Mike McCreary* and *Paul Dunne* for the applicant; *Jim Hassell* and *Kosta Katsoulis* for the respondent.

DECISION OF THE BOARD; August 1, 1991

1. The name of the respondents are hereby amended to read: "176218 Canada Inc. c.o.b. as Booth Fisheries; Van Horne Fish Distributors Ontario Ltd.; and 167100 Canada Inc. c.o.b. as Groupe La Mer". The Board directs that the above applications be and the same are hereby consolidated.
2. Board Files No. 0144-90-R and 2050-90-R are applications under section 63 of the *Labour Relations Act* (the "Act") and Files No. 0145-90-R and 2051-90-R are applications under section 1(4) of the Act.
3. Teamsters Local 419 (the "applicant" or the "union") is seeking a declaration that 176218 Canada Inc. c.o.b. as Booth Fisheries ("Booth"), 167100 Canada Inc. c.o.b. Groupe La Mer ("Groupe La Mer") and Van Horne Fish Distributors Ontario Ltd. ("Van Horne") are and always have been one employer for the purposes of the Act. Should the application pursuant to section 1(4) of the Act be unsuccessful, the union has requested that the Board consider its application pursuant to section 63 of the Act. If the Board finds in the unions favour with regard to the applications pursuant to section 1(4) of the Act, it will not be necessary to make a finding on the applications under section 63 of the Act.
4. 126953 Canada Inc. is the "parent" or "holding" company for Booth, Van Horne and Groupe La Mer. It owns all of the preferred and common shares of Booth, Van Horne and Groupe La Mer. In addition to owning the shares of the three companies directly affected by this application, it also owns the shares of seven other affiliated companies.
5. The Board heard evidence from three witnesses in this case. Mr. Kosta Katsoulis was called on behalf of the respondent companies and Mr. Garry Blakely and Mr. John Gutauskas were witnesses on behalf of the union. In assessing the credibility of the three witnesses the Board took into account the usual factors, including their ability to avoid the influence of self interest, their general demeanour, their ability to recall the events and what was reasonably probable in all the circumstances. We would observe that Mr. Blakely and Mr. Gutauskas gave their evidence in a straightforward, candid manner and the Board finds them both to be credible witnesses. On the

other hand, Mr. Katsoulis was inconsistent and at times very evasive. He was unable to resist the influence of self interest. In areas where his evidence conflicts with that of the other witnesses the Board will accept the evidence given by Mr. Blakely and Mr. Gutasukas.

6. Mr. Kosta Katsoulis is the president of the holding company, his sister Diane Cicirello is the vice-president and his brother Anastasuis Katsoulis is the secretary-treasurer. Although Mr. Katsoulis' evidence was not clear on this point it appears that he and his brother and sister control the voting or common shares. The preferred or non-voting shares have been divided equally between their nine children (each one has three children). Two of Mr. Kosta Katsoulis' children, Helen Katsoulis and Mary Katsoulis, are active in the business. The business is very much a family business, and in addition to those members already named, Diane Cicirello's husband A. Cicirello is also active in the business.

7. Mr. Kosta Katsoulis is the directing mind in this family business made up of various incorporated and unincorporated entities. He is the controlling shareholder in the holding company and he makes the major decisions affecting that company and any of the affiliates. He testified that if he made a decision with which his brother and sister disagreed he would proceed to implement it and they "would back off". If any of the family members made a decision that he disagreed with, he has the authority to veto it. Mr. Katsoulis is the ultimate authority in this family business, which includes the three companies at issue in these proceedings, Booth, Van Horne and Groupe La Mer. It is clear to the Board, and Mr. Katsoulis admitted that he "controls" Booth, Van Horne and Groupe La Mer.

8. Each of the companies in this proceeding have a combination of family members in executive positions. Diane Cicirello is the president of Van Horne, A. Cicirello and K. Katsoulis are the vice-presidents, Helen Katsoulis is the secretary-treasurer, and Mary Katsoulis is the assistant secretary-treasurer. Anastasius Katsoulis is the president of Booth and Groupe La Mer, Helen Katsoulis is the vice-president of both companies and Mary Katsoulis is the secretary-treasurer of both companies.

9. Mr. Katsoulis testified that on May 6, 1989, he purchased Booth from Sara Lee Inc. Booth has carried on business at 6080 Indian Line Road in Mississauga for a number of years, both before and after its purchase by Mr. Katsoulis. Booth is a party to a collective agreement with the union, and this collective agreement was in existence at the time of the sale of Booth to Mr. Katsoulis. The recognition clause of the current collective agreement states in part:

Article 1 - Recognition

- 1.01 The Company recognizes the Union as the exclusive bargaining agent with respect to all matters covered by this Agreement for all employees of the Company, save and except foremen, persons above the rank of foremen, office and sales staff, located at the respective plant of the above named Company in Toronto, Canada.

...

- 1.03 It is agreed between the parties that work that is normally performed by members of the bargaining unit will not be done by anyone outside of the bargaining unit while employees are laid off, working short time, which would reduce the working force or deny them the opportunity of working overtime.

...

10. Booth is engaged in the business of distributing fish products and specializes in frozen fish. Approximately eighty percent of Booth's business is in frozen product and the remainder is in

fresh fish. Booth has approximately sixteen sales people and fourteen employees in the product distribution side of the business. It appears that the premises occupied solely by Booth in 1989 were approximately 45,000 - 50,000 square feet. Some of the space was not being utilized.

11. Van Horne carries on business at 136 Crockford Boulevard in Scarborough. It too is a fish products distributor. As it specializes in fresh fish, approximately eighty percent of Van Horne's business is in fresh fish and the remaining twenty percent is in frozen fish. Van Horne employs approximately twenty-two employees.

12. Around October, 1989 Van Horne started using some of the surplus space at Booth's facility on Indian Line Road for storage. At this point in time Van Horne would occasionally send one or two of its employees to work on the Booth premises.

13. In February, 1990 Van Horne moved its operations into Booth's facilities on Indian Line Road. The employees of Booth and Van Horne worked side by side processing orders for both companies. The Van Horne employees performed work which had previously been done by Booth employees and vice-versa. During this period two Van Horne employees, Francis Amankwass and John Robitaille performed fresh fish filleting work that had previously been done by Booth employees. The inventory of fresh and frozen fish owned by the two companies was for the most part not kept in separate areas, but was intermingled. Both companies were and still are in the fish distribution business. At this point the receiving of fish product was done by both Booth and Van Horne employees. A Van Horne employee inspected and received most of the fresh fish and Booth employees received most of the frozen product. The fresh product was then stored in the cooler and the frozen product was kept in a freezer. Employees from either company could access both areas to fill customer orders. When inventory was taken, employees from Booth and Van Horne would work together to complete it.

14. While most of the fish product arrived by truck, fresh fish was on occasion flown in by airplane. Employees from both companies would be called upon to travel to the airport to pick-up this fish. Van Horne employees would pick up fish that could end up in the hands of customers of Booth and vice-versa.

15. During this period the delivery of the product to the customers of each company was also not kept entirely separate. For example a Booth driver and Booth truck did deliver fish to a Van Horne customer. Mr. Katsoulis testified that although this did not happen often he did not see anything wrong with the two companies covering for each other. As Mr. Katsoulis said, "if the Van Horne truck was not there we would ask the Booth truck - the customer had to be served".

16. The employees shared a common change room, lunchroom and work areas. The forklifts, towmotors and other equipment owned by Booth was utilized by both Booth and Van Horne employees in the course of their duties.

17. In June, 1990 as a result of inventory problems and an agreement reached with the union, Van Horne moved out of the Indian Line Road facility and returned to the Scarborough location where it is still currently located.

18. At some point over the summer extensive renovations were completed at the Indian Line Road facility. A wall was built which segregated approximately 3,000 - 4,000 square feet. Separate washrooms, changerooms and a lunchroom were built in this newly segregated area. Booth's operations were moved into this smaller space and most of the remainder of the building was to be utilized by the other company in these proceedings, Groupe La Mer.

19. Groupe La Mer was formed in May, 1990. Mr. Katsoulis testified that this company was set up to centralize the fish product inventory and to centralize the purchasing function generally. Groupe La Mer purchases fish product from all over the world and then supplies it to Booth and Van Horne. After the inception of Groupe La Mer, neither Booth nor Van Horne were permitted to purchase anything on the open market. They own no assets and no inventory. Groupe La Mer owns all of the inventory. As Mr. Katsoulis indicated at one point "Booth and Van Horne don't have assets, just receivables and payables to Group La Mer". Booth and Van Horne receive all of their supplies from Group La Mer. Sometime after the completion of the renovations, Groupe La Mer moved into the Indian Line location. It occupies the premises which were segregated off from that part of the warehouse occupied by Booth. There is no internal access or connection between the two parts. To go to Booth from Groupe La Mer one has to go outside.

20. Mr. Blakely, the first witness called by the union, is employed as a driver/warehouseman for Booth. He has worked for Booth in that capacity for ten years. He testified that at the time of, and after the sale of Booth to Mr. Katsoulis, Booth employees performed the full range of receiving and shipping functions. They received product from a variety of suppliers continually throughout the day. To use his words, "there were trucks coming and going all day". After the product was unloaded from the truck it would be checked and counted by the foreman, and then bargaining unit employees would move it into the appropriate storage area. In addition to receiving goods, Booth employees were also expected to do the occasional "pick-up" of product either at the airport or at a supplier's warehouse. The drivers/warehousemen also performed a function known as "picking" orders which consists of filling customer orders. They would be given a particular order from a customer and they would put together the appropriate fish product to fill the order. With regard to fresh fish, some orders would call for the product to be filleted. Filleting is a specialized, skilled job, and at this time Booth had two employees who were qualified filleters. In addition to filling orders, the Booth employees also ensured that the frozen product was rotated and properly stored. Once the orders were "picked" they would be loaded on the appropriate truck for delivery. Each of the drivers had a route with many stops to drop off orders along the way. At the end of the shift, the drivers/warehouseman would clean the work area, which at that time was approximately 45,000 square feet.

21. The creation of the new company, Groupe La Mer, had a significant impact on many of the above noted daily duties performed by Booth Employees. After Groupe La Mer moved in to the Indian Line location, many of these functions changed. Instead of receiving product throughout the day from many different suppliers, Booth now receives only a couple of trucks a day from Groupe La Mer. Group La Mer receives all of the fish product from a variety of suppliers and has all of the storage facilities for this product. Groupe La Mer employees review the total orders to be filled by Booth on a given day. They then load the product on skids. The product is arranged on the skid in accordance with the route the truck driver will follow. The Groupe La Mer employees separate the bulk product by route prior to sending it next door to Booth. The product on skids is then loaded back onto a truck and taken next door for delivery to Booth. Any required filleting of fresh fish is also now performed by Group La Mer employees. When the product arrives from Groupe La Mer, Booth employees separate the product on the skids into the individual customer orders and load the product onto the Booth truck for delivery. Therefore Booth employees no longer spend as much time receiving the fish product, nor are they responsible for storing it and maintaining the inventory (i.e. rotating and counting stock). They no longer fillet fresh fish as this is done for them by Groupe La Mer employees. Booth employees no longer pick up orders at the warehouse of suppliers or at the airport as this is now done by Groupe La Mer employees. Some of the "picking" of orders function has been lost as Groupe La Mer employees now arrange the product in bulk on skids for the Booth employees. Before this additional step was added to the process Booth employees were responsible for all the work involved in filling an order. Clearly the efforts

of Groupe La Mer employees has expedited the “picking” process and reduced the workload of the Booth employees. Booth employees are no longer responsible for the clean up of the entire warehouse but only their 3,000 - 4,000 square feet of space. Although the evidence on this was somewhat limited it appears that some of Booth’s equipment has been moved to the Groupe La Mer premises and is being used there.

22. After Groupe La Mer’s creation other business functions formerly carried out by Booth and Van Horne were also centralized. Although Mr. Katsoulis’ evidence was not very clear on this point, it appears that much of the banking for the family business, including Booth and Van Horne, is centralized. Operating expenses are paid out of one central account for all the companies. Bookkeeping functions for Booth, Van Horne and Groupe La Mer are centralized and performed by a staff of approximately twenty Groupe La Mer employees. The function is headed up by the Comptroller David Hoe.

23. Mr. Katsoulis in his evidence stressed that Groupe La Mer is a *wholesaler* of fish products, and that Booth and Van Horne were *distributors*. In his opinion this made them very different businesses. We would note that the line between the two functions may not be as clear as Mr. Katsoulis attempted to portray it. Groupe La Mer if it is a wholesaler, supplies fish products only within the family business. It does not supply fish product to any unaffiliated company. The Board concludes therefore that to describe Groupe La Mer as a wholesaler, and Booth and Van Horne as distributors, is to put an artificial gloss on the business being conducted. The purchasing, and receiving portions of Booth’s and Van Horne’s business were split off and a new company created to perform those functions. To portray Booth and Groupe La Mer, and Van Horne and Groupe La Mer as distinct businesses is simply not accurate. Both pairs are parts of what was once a business engaged in distributing fish products wholesale.

24. Mr. Katsoulis also stressed that although both Booth and Van Horne were fish distributors they were very different companies because Booth sold 80 percent frozen fish and 20 percent fresh fish and Van Horne sold 80 percent fresh fish and 20 percent frozen fish. While we accept Mr. Katsoulis’ evidence that fresh fish require more attention, have a shorter shelf life and must be moved quickly, and require specialized skills to be filleted properly, the evidence is clear that both Booth and Van Horne employees handle both types of fish. While the percentages of fresh and frozen fish handled by each company is different, they both deal with fresh and frozen fish and they both are in the fish distribution business. To say that they are different businesses is simply not accurate. The similarity of the work is also evidenced by the interchange of work which went on during the period when Booth and Van Horne were under the same roof. Mr. Gutauskas, the second witness called by the union, was a supervisor for Booth Fisheries at the time that Booth and Van Horne were sharing the Indian Line premises. He testified that the employees of Van Horne and Booth basically performed the same work and that the two businesses were essentially the same. He said that both Booth and Van Horne were engaged in the business of buying and selling seafood and generally the distribution business.

25. In the fall of 1990, when Groupe La Mer moved into Indian Line Road, John Robitaille and Francis Amankwass (two former Van Horne employees) came back to the Indian Line location, this time as Groupe La Mer employees. They are both still employed by Groupe La Mer. Around the same time four Booth employees, Len Nelson, Brian Guthro, Dan Knight and C. Tan were “loaned” to Groupe La Mer from Booth. Mr. Katsoulis testified that because Booth’s business “was down” they were going to have to lay-off employees. To avoid the lay-offs, the four employees were “loaned” to Groupe La Mer where work was available for them. Mr. Katsoulis testified that the four remained on Booth’s payroll and were still Booth employees. When confronted with the pay stubs for Len Nelson and Brian Guthro which indicated they had been paid by

Groupe La Mer and were on their payroll, Mr. Katsoulis indicated that it was an administrative error. The Board concludes therefore that when Groupe La Mer started operating, employees from Van Horne and Booth were transferred over to this new company. We note that after the transfer to Groupe La Mer, Brian Guthro and Dan Knight occasionally worked on the Booth side. Mr. Guthro has driven a Booth truck and Mr. Knight has cut halibut on behalf of Booth.

26. Groupe La Mer, Booth and Van Horne are connected by a shared computer system. Booth sales people obtain orders, these are entered into the computer and generate the "pick slips" utilized by the Groupe La Mer employees in preparing the bulk orders for Booth. After the product has moved from Groupe La Mer to Booth, a bill is automatically generated. When Booth has paid for the fish, the money automatically flips from Booth's bank account into an account utilized by Groupe La Mer to pay the supplier.

27. Photographs of the sign on the building located at Indian Line Road were put before the Board. The sign reads:

BOOTH FISHERIES
a Division of Groupe La Mer

Booth's letterhead says the same thing.

28. Mr. Katsoulis testified that each of the three companies Booth, Van Horne and Groupe La Mer were managed independently of each other. Mr. Gutasukas, originally a supervisor for Booth testified to the contrary. He put before the Board a notice which indicated as follows:

GROUPE LA MER

February 14, 1991

TO: All Employees

FROM: Carl D. Cameron

Please, join with me on congratulating Mr. John Gutasukas on his promotion to Operations Manager of Groupe La Mer with responsibilities for Groupe La Mer, Mississauga and Booth Fisheries.

The Board heard very little evidence with regard to the day to day management of Booth, Van Horne and Groupe La Mer. We have no difficulty concluding however that although each business was run separately, no major decisions could or would be made without Mr. Kosta Katsoulis' involvement. When Mr. Katsoulis was asked who was in charge of Labour Relations for Booth, he replied that he has asked the supervisors to communicate with the employees and solve problems in that way. Mr. Katsoulis was quite vague when asked what supervisors were to do if they could not resolve a problem, but based on Mr. Katsoulis' evidence it appears that they can contact counsel for advise. Supervisors have the authority to discipline and Mr. Katsoulis testified that he too had the authority to discipline. He said "I can discipline someone myself. If I walk by and someone laughs at me I can discipline him. If I was calm I would go to his supervisor and not do it myself". Given that this is the extent of the evidence before the Board with regard to whether or not the control of labour relations is centralized, the Board cannot determine this issue. We would observe however that it seems likely that any major "labour relations" decisions would be made by Mr. Katsoulis given the level of control he exerts in the company.

29. Although Booth and Van Horne have their own customers or clients, the evidence makes it clear that they both are suppliers of fresh and frozen fish product. Both of their client lists

include a mixture of retailers of fish, hotels, restaurants, fish and chip shops and supermarkets such as Loblaw's or A & P.

Decision

30. We turn first to consider the section 1(4) application. The relevant section of the Act states as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The Board's case law makes it clear that these are three criteria which must be met before a common employer declaration will be made pursuant to section 1(4) of the Act. First of all, there must be more than one corporation, individual, firm syndicate or association involved; secondly these organizations or entities must carry on associated or related activities or businesses whether or not simultaneously; and thirdly these various organizations or entities must be under common control or direction. If these three criteria are met, the Board has the discretion to make a common employer declaration. The declaration is not automatic, but is discretionary.

31. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, the Board elaborated on the intent of section 1(4) of the Act:

• • •

12. Section 1(4) of *The Labour Relations Act* provides as follows:

"Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the

addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section 55. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through which ever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union’s bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section 55 into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

• • •

32. Counsel for the respondent companies conceded that the first criteria had been met. He acknowledged that in this proceeding before the Board, we are dealing with more than one corporation or business.

33. In the *Walters Lithographing Company Limited*, [1971] OLRB Rep. July 406, the Board set out the relevant criteria which should be considered prior to reaching a determination on the common employer issue. These are:

• • •

21. The indicia or criteria which the Board considers relevant in making a determination as to whether the activities or businesses of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer are -- (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. No single criterion is likely to decide the issue. Rather, as has been stated, the Board’s determination undoubtedly will be based on an appraisal of all of them in the light of the particular facts before it. It hardly need be said that in applying the above criteria, the greater the degree of functional coherence and interdependence which the Board finds among the associated or related activities and businesses the more probable it is that the Board will conclude that the entities carrying on these activities should be treated as one employer. We would mention here also that the indicia or criteria themselves obviously overlap. For that reason, in applying them to the facts of the instant case we have not attempted to deal with each criterion on an individual basis.

• • •

On the facts of this case, it is clear that Booth, Van Horne and Groupe La Mer are part of a family

business which is owned and controlled by Mr. Kosta Katsoulis. It is his business and he makes all of the important decisions. It is obvious that Booth, Van Horne and Groupe La Mer are under common control and direction and we so find.

34. The final determination to be made is whether or not Booth, Van Horne and Groupe La Mer carry on related or associated activities or businesses. In the *Brant Erecting and Hoisting* case, *supra*, in dealing with this issue the Board said:

• • •

15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in "associated or related activities or businesses" since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be "related" within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the "associated or related activities or businesses" need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. *Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals.* If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

[emphasis added]

• • •

35. On the facts of this case, the criteria set out above are met. Booth, Van Horne and Groupe La Mer are all involved in the distribution of fish products therefore clearly they are of the same "character". Groupe La Mer supplies Booth and Van Horne with fish product and both Booth and Van Horne are simply stepping stones along the way to the ultimate customer. These customers make up the same general market consisting of hotels, restaurants, retailers, supermarkets etc. All three companies employ the same means and mode of operation which is the receiving, warehousing and shipping of fish products. The employee skills required to run the three operations are essentially the same. The employees of Booth and Van Horne worked side by side and were interchangeable while they were under the same roof at Indian Line Road. The three businesses are carried on for the benefit of related principals, the Katsoulis family.

36. In addition to the above, we would also observe the following additional facts which contribute to the conclusion that Booth, Van Horne and Groupe La Mer are carrying on related or associated activities or businesses. Groupe La Mer only sells to companies which are a part of the Katsoulis family business, and Booth and Van Horne can only buy from Groupe La Mer. Groupe La Mer can access the bank accounts of Booth, there have been "loans" and "transfers" of employees from Booth and Van Horne to Groupe La Mer, the three companies share a computer system and bookkeeping accounting staff, there is a centralized payment system utilized by all three companies, Booth and Van Horne do not own any inventory as it is all owned by Groupe La

Mer, and finally, the company signs and letterhead describe Booth as a “division” of Groupe La Mer.

37. The evidence in the case before us overwhelmingly points to the conclusion that Booth, Van Horne and Groupe La Mer are separate entities under common control and direction engaged in associated or related businesses or activities. The next question to be decided is whether this is an appropriate case in which to exercise our discretion and made a section 1(4) declaration.

38. In *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214 the Board in dealing with the purpose of section 1(4) stated:

...

40. Section 1(4) is designed to accomplish at least three purposes:

- (1) One objective is to prevent the erosion of bargaining rights. Take a case in which a union is certified to represent the employees of a firm; as soon as certification is granted, the proprietor redirects work to another enterprise. Treating both corporations as one employer preserves the union's bargaining rights. The large numbers of cases in this category include *Dominion Stores Ltd.*, *supra.*; *Radio Shack*, *supra.* and *Great Atlantic and Pacific Company of Canada*, [1982] OLRB Rep. Mar. 386.
- (2) Section 1(4) also removes roadblocks to viable structures for collective bargaining. For example, on an application for certification, the Board may include the employees of two companies in a single unit. See *Walters Lithographing Company*, [1971] OLRB Rep. July 406 and *Diversey (Canada) Ltd.*, *supra.* For a case in which a related employer declaration was issued at the instance of management, see *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. Mar. 247.
- (3) Another function of section 1(4) is to ensure that the union representing employees is able to deal directly with the person or company possessing real economic control over them rather than with someone else who is their employer in name only. See *J. H. Normick Inc.*, *supra.* and *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008.

...

These criteria shed some light on the kinds of situations in which it may be appropriate for the Board to exercise its discretion and make the section 1(4) declaration.

39. On the facts of the case before us it is clear that bargaining unit work has been taken from Booth and is now being performed by Groupe La Mer employees. Groupe La Mer employees are receiving product from a variety of suppliers, selecting and preparing orders in bulk, performing “pick-ups”, storing and maintaining the inventory of fish products used by Booth and Van Horne and performing the fresh fish filleting for Booth customers. As all of this work used to be done by Booth employees, there has been a direct diversion of work from Booth, a unionized company, to Groupe La Mer, a non-unionized company. Four Booth employees were “loaned” to Groupe La Mer at the time of its start-up. The alleged reason for this transfer was to prevent the lay-offs of these employees due to a slow down in business. On the evidence before us it is difficult to ascertain the cause of the slowdown but we have no doubt that work formerly done by Booth was being done by Van Horne. We find therefore, that there has been an erosion of the union's bargaining rights.

40. The facts in this case raise exactly the kind of scenario which section 1(4) of the Act was intended to address. What has occurred is an erosion of the Booth bargaining unit and an erosion of the bargaining rights of the employees. The Board therefore declares that 176218 Canada Inc.

c.o.b. as Booth Fisheries, 167100 Canada Inc. c.o.b. as Groupe La Mer and Van Horne Fish Distributors Ontario Ltd. constitute one employer for the purposes of the *Labour Relations Act*. The effect of a section 1(4) declaration is to affirm that Booth, Van Horne and Groupe La Mer are "one employer" and must be treated as a single business entity for the purpose of any collective bargaining obligations arising under the statute. Consistent with the manner in which the parties put this case before the Board, and the submissions of the parties, the collective agreement does not apply to the Van Horne employees working in, and the work performed at, the premises in Scarborough. In the circumstances it is unnecessary for the Board to direct its attention to the two applications made under section 63 of the Act.

41. Counsel for the respondent has requested that any remedial relief granted by the Board be prospective only and not retroactive. We see no reason here to do so, and indeed, it would be inequitable and inappropriate to do so. Our declaration shall therefore have force and effect from the time the associated or related activities or businesses commenced. (See *JDS Investments Limited*, [1981] OLRB Rep. March 294).

0621-91-R; 0622-91-U; 3084-90-M Ontario Nurses' Association, Applicant v. Carecor Health Services Inc., Baycrest Hospital, Centenary Hospital, Central Hospital, Clarke Institute of Psychiatry, Donwood Institute, Etobicoke General Hospital, Hillcrest Hospital, Humber Memorial Hospital, Lyndhurst Hospital, Mount Sinai Hospital, North York General Hospital, Northwestern General Hospital, Princess Margaret Hospital, Providence Villa and Hospital, Queen Elizabeth Hospital, Queensway General Hospital, Scarborough General Hospital, St. Joseph's Health Centre, St. Michael's Hospital, Sunnybrook Medical Centre, Toronto East General Orthopaedic Hospital, Toronto General Hospital, Toronto Western Hospital, Wellesley Hospital, West Park Hospital, Women's College Hospital, York-Finch General Hospital, Respondents; Ontario Nurses' Association, Applicant v. Carecor Health Services Inc., Baycrest Hospital, Centenary Hospital, Central Hospital, Clarke Institute of Psychiatry, Donwood Institute, Etobicoke General Hospital, Hillcrest Hospital, Humber Memorial Hospital, Lyndhurst Hospital, Mount Sinai Hospital, North York General Hospital, Northwestern General Hospital, Princess Margaret Hospital, Providence Villa and Hospital, Queen Elizabeth Hospital, Queensway General Hospital, Scarborough General Hospital, St. Joseph's Health Centre, St. Michael's Hospital, Sunnybrook Medical Centre, Toronto East General Orthopaedic Hospital, Toronto General Hospital, Toronto Western Hospital, Wellesley Hospital, West Park Hospital, Women's College Hospital, York-Finch General Hospital, Respondents; Ontario Nurses' Association, Applicant v. Carecor Health Services Inc., Ontario Hospital Association, Baycrest Hospital, Canadian Red Cross Blood Transfusion, Centenary Hospital, Central Hospital, Clarke Institute of Psychiatry, Donwood Institute, Etobicoke General Hospital, Humber Memorial Hospital, Lyndhurst Hospital, Mount Sinai Hospital, North York General Hospital, Northwestern General Hospital, Princess Margaret Hospital, Providence Villa and Hospital, Queen Eliz-

abeth Hospital, Queensway General Hospital, Scarborough General Hospital, St. Joseph's Health Centre, St. Michael's Hospital, Sunnybrook Medical Centre, Toronto East General Orthopaedic Hospital, Toronto General Hospital, Toronto Western Hospital, Wellesley Hospital, West Park Hospital, Women's College Hospital, York-Finch General Hospital, Respondents

Employee Reference - Practice and Procedure - Related Employer - Unfair Labour Practice - Board ruling on various preliminary and/or procedural matters - Board adjourning union's s.106(2) application and dismissing its s.89 complaint in part - Board directing that union's s.1(4) application and s.89 complaint proceed together and that they be pre-heard together - Board declining to defer to arbitration and concluding that dispute raises important labour relations, public policy and legal issues - Union directed to provide additional particulars and to specify relief sought

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *James Hayes*, *Mark Geiger*, *David Matheson* and *Dan Anderson* for the applicant; *T. F. Storie*, *J. L. Thomson* and *E. Crabtree* for Ontario Hospital Association; *Brian O'Byrne* for Princess Margaret Hospital; *Barry W. Earle* and *Melany Franklin* for Carecor Health Services Inc.; *D. B. Francis* and *K. Marshall* for Sunnybrook Health Science Centre; *Elizabeth Hosie* for Etobicoke General Hospital; and *Joanne Elek* for Toronto Hospital

DECISION OF THE BOARD; August 27, 1991

1. Board File No. 3084-90-M is an application for a determination by the Board under subsection 106(2) of the *Labour Relations Act*. Board File No. 0621-91-R is an application for relief under subsection 1(4) of the Act. Board File No. 0622-91-U is a complaint under section 89 of the Act in which the complainant trade union (the "ONA") alleges that the respondents have committed certain unfair labour practices.

2. The application in Board File No. 3084-90-M as against George Street L. McCaul Chronic Care Centre, Canadian Red Cross Blood Transfusion, and the Toronto Hospital is withdrawn with leave of the Board.

3. At the hearing on August 2, 1991, the Board ruled, orally, as follows:

- (a) the majority of the Board (Board Member Pirrie dissenting; he would have dismissed the complaint in its entirety) dismissed the allegations in Board File No. 0622-91-U that the respondents had breached section 50 and 66 of the Act;
- (b) the Board directed that the subsection 1(4) application in Board File No. 0621-91-R proceed together with that part of the complaint in Board File No. 0622-91-U which had not been dismissed;
- (c) the Board directed the ONA to specify the relief it is seeking in the subsection 1(4) application in Board File No. 3084-90-M, both primarily and in the alternative;
- (d) the Board directed the ONA to provide particulars of its allegations in paragraph 17, 18 and 24 of schedule C to its complaint in Board File No. 0622-91-U, and, more specifically, of:

- i) the names of the “other agencies/registries” referred to in paragraph 17;
 - ii) the extent and nature of the use by the respondent hospitals of registered nurses provided by the agencies/nurses referred to in paragraphs 17 and 18;
 - iii) the inquiries made and responses received with respect to the reasons registered nurses were obtained and used by the respondent hospitals from the other agencies/registries as alleged in paragraph 17 and 18;
 - iv) the extent and nature of the respondent hospitals use or reliance upon the respondent Carecor Health Services Inc. and nurses provided by Carecor Health Services Inc. as alleged in paragraph 18;
 - v) the inquiries made and responses received with respect to the reasons registered nurses were obtained from the respondent Carecor Health Services Inc. by the respondent hospitals as alleged in the complaint;
 - vi) the nature and extent of the erosion of its bargaining rights as alleged by the ONA in paragraph 24, both incrementally and in totality;
- (e) the Board directed that the application in Board File No. 3084-90-M be adjourned pending the disposition by the Board of Board File Nos. 0621-91-R and 0622-91-U or until otherwise ordered by the Board;
- (f) the Board directed that Board File Nos. 0621-91-R and 0622-91-U be pre-heard together on August 30, 1991;
- (g) the Board noted the ONA’s undertakings to provide the particulars directed by the Board prior to the pre-hearing conference directed by the Board and to provide counsel for the respondents with a list of the areas of inquiry for the purposes of the disclosure contemplated by subsection 1(5) of the Act;
- (h) the Board directed that every party provide to every other party and to the Board a list of all documents relevant to the proceedings in Board File Nos. 0621-91-R and 0622-91-U which are in its possession, power or control, and that each party indicate which of the documents, if any, it has listed it objects to producing, together with the reasons for any objection in that respect.

Finally, we wish to note that in its submissions, the ONA advised the Board that the relief it is seeking in these applications and complaint is only prospective from the date of its first application, not retrospective.

4. As the Board file numbers indicate, the subsection 106(2) application was the first one

filed. As the Board (differently constituted in part) observed in a decision dated March 21, 1991 (since reported at [1991] OLRB Rep. March 298) with respect to that application, the relief which the ONA specified it was seeking did not include the standard request for a declaration by the Board that any person is (or is not) an “employee” within the meaning of the Act. On the other hand, the ONA did request the kind of relief generally sought in an application under subsection 1(4) or a complaint under section 89 of the Act, or in a grievance. Subsequently, the ONA, through counsel, advised the Board that the schedule in which the subsection 1(4) relief and the section 89 type relief was requested had been inadvertently included in the subsection 106(2) application. Although counsel’s letter to the Board in that respect did not specifically say so, it was implicit in it that those requests for relief were being withdrawn.

5. Later still, the ONA filed the separate subsection 1(4) application and section 89 complaint in Board File Nos. 0621-91-R and 0622-91-U respectively.

6. From what the Board heard of the subsection 1(4) application, and notwithstanding the curious reluctance of the ONA to say so directly, it appeared that the ONA is seeking a declaration that the respondents taken together constitute one employer for purposes of the Act, or, in the alternative, that the respondent Carecor Health Services Inc. and the respondent hospitals, either individually or in groups of two or more, constitute several such single employers for purposes of the *Labour Relations Act*.

7. In the section 89 complaint, the ONA alleges, in effect, that the respondent hospitals have formed the respondent Carecor Health Services Inc. to provide a pool of registered nurses to be used by the hospitals. The ONA alleges that the hospitals have used this pool of nurses provided by Carecor Health Services Inc., and by other unspecified agencies/registries, and that the respondent hospitals have refused to acknowledge that such agency nurses (as they may be conveniently referred to as a class) are employees of the individual hospitals who are covered by the various collective agreements which the ONA has with them. The ONA alleges that this conduct by the individual respondents and Carecor Health Services Inc. has resulted in an erosion of its bargaining rights and constitutes a breach or breaches of sections 50, 64 and 66 of the *Labour Relations Act*.

8. In its subsection 106(2) application, the ONA seeks a declaration that the agency nurses provided to the respondent hospitals by the respondent Carecor Health Services Inc. are “employees” within the meaning of the Act, that these agency nurses are in fact employees of the individual hospitals, and that they are covered by the various collective agreements between the respondent hospitals and the ONA.

9. The respondents submitted that both applications and the complaint should be dismissed. They argued that the Board has no jurisdiction to determine the real issue between the parties; namely, whether the agency nurses are covered by the various collective agreements between the ONA and the respondent hospitals, which, coupled with the delay in instituting these proceedings which is evident on the ONA’s own pleadings, should cause the Board to dismiss them. In the alternative, the respondents submitted that the real issue between the parties is a contractual one which is within the exclusive jurisdiction of a Board of Arbitration to determine and that the Board should defer dealing with all three matters, but particularly with the subsection 106(2) application, to such arbitration proceedings. The respondents also variously argued that the Board should not consolidate any of the proceedings as requested by the ONA, that the section 89 complaint should be dismissed as against the respondent Carecor Health Services Inc. because no *prima facie* case has been pleaded against it, and that the proceedings as against the respondents Princess Margaret Hospital and Etobicoke General Hospital should be severed. The respondents

also requested that the Board direct the ONA to provide particulars of the allegations in its section 89 complaint.

10. It is true that the theme which is prevalent in and common to all three proceedings herein is the ONA's assertion that the respondent hospitals are in breach of their collective agreements with the ONA in that they have refused to acknowledge that the agency nurses are their employees and covered by those collective agreements. The respondents conceded that the agency nurses are "employees" within the meaning of the Act. However, the respondents' position is that these agency nurses are employees of the respondent Carecor Health Services Inc., the agency, not of the individual hospitals, and, further, that such nurses are not covered by any of the applicable collective agreements between the respondent hospitals and the ONA, even if they are employees of those hospitals.

11. Nevertheless, upon considering the material before the Board and the representations of the parties, the Board ruled as set out in paragraph 3 above.

12. The Board concluded that the subsection 1(4) application should proceed because the issues raised in it lie at the root of the dispute between the parties, and which dispute raises important labour relations, public policy and legal issues. These issues are best, and most comprehensively and expeditiously, litigated before the Board. Indeed, they are issues which can only be determined by the Board.

13. The Board did, however, find it appropriate to direct the ONA to specify the relief it is seeking in its subsection 1(4) application. There is nothing necessarily wrong with pleading in the alternative or in seeking alternative remedies, even if the alternatives appear to be or are inconsistent. However, because it is the pleadings (including the request for relief) which provide a structure to a proceeding by delineating the dispute between the parties and the issues to be adjudicated, a party is, in our view, obliged to clearly specify the relief it is seeking.

14. The Board did not consider it appropriate to proceed the subsection 106(2) application at this time. However, neither did the Board find it appropriate to defer the matter to arbitration as requested by the respondents. Instead, the Board found it appropriate to defer consideration of whether or not the subsection 106(2) application should be deferred to arbitration pending the disposition of the subsection 1(4) application. It appeared to the Board that the disposition of the subsection 1(4) application is something which is relevant to and could even be determinative of that question, and indeed possibly of the whole subsection 106(2) application. The Board also concluded that hearing this subsection 106(2) application together with the subsection 1(4) application would, given the nature of such proceedings, unduly delay and complicate the subsection 1(4) proceeding.

15. It appeared to the Board that the essence of section 89 complaint is that the use of agency nurses, whether or not it constitutes a "contracting out" of work, constitutes an improper attempt to avoid the trade union. Consequently, while the Board was unanimously of the view that the ONA had failed to plead a *prima facie* case to support its allegations that the respondents have breached either section 50 or section 66 of the Act, the majority of the Board (Board Member Pirrie dissenting) was satisfied that a *prima facie* case for the alleged breach of section 64 had been pleaded, though somewhat baldly.

16. The Board rejected the ONA's argument that it had pleaded all necessary particulars in respect of the alleged of section 64. The Board agreed with the comments in *Pebrá Peterborough Inc.*, [1987] OLRB Rep. March 421 at paragraphs 3, 4 and 5 with respect to the rationale for requiring particulars and the factors which the Board will consider in determining whether a party

should be required to provide them. The Board appreciated that, to the extent that the ONA's section 89 pleadings repeat its subsection 1(4) pleadings, the ONA may not have all of the information it would like or even that it might require. It is possible, for example, that the reasons for the respondent hospital's use of or reliance on agency nurses may be something which the ONA does not have particulars of. On the other hand, the Board expected that the ONA would have more particulars than it has pleaded regarding the extent and nature of that alleged use of or reliance upon agency nurses. The Board found it difficult to understand how or why the ONA would have initiated any of these proceedings if that was not the case. Further, the Board observed that these proceedings relate to the use of nurses who are said to work side by side with bargaining unit nurses represented by the ONA. In the circumstances, the Board concluded it could be fairly anticipated that additional particulars are available to the ONA and that these should be provided to the respondents.

17. In order to avoid a multiplicity of proceedings, and in order to proceed in as comprehensive and expeditious a manner as possible, the Board determined that it was not appropriate, in the circumstances, to sever the proceedings as against the respondent Princess Margaret Hospital or the respondent Etobicoke General Hospital. Nor did the majority of the Board, (Board Member Pirrie dissenting) find it appropriate in the circumstances to dismiss the section 89 complaint as against the respondent Carecor Health Services Inc.

18. Similarly, the Board determined that the subsection 1(4) proceeding and what remains of the section 89 complaint should proceed and be heard together (for the distinction between this and consolidation see, for example, *Dresser Canada, Inc.*, [1987] OLRB Rep. Oct. 1243 at paragraph 8). Not only is the underlying dispute and core issue the same in both matters, but it is simply more expeditious to hear the two together. To cite but one example, doing so will eliminate any need to make rulings regarding the admissibility of evidence which may be arguably relevant to one proceeding but not to the other.

19. Although the Board declined to dismiss any of the three matters herein because of delay, the Board's rulings are without prejudice to the right of the respondents to raise, in evidence or argument, the issue of delay with respect to the question of the manner in which the Board ought to dispose of them. Further, we note that nothing which has occurred herein precludes the collective agreement dispute between the parties from being taken to arbitration.

0746-91-R United Plant Guard Workers of America Local 1962, Applicant v. Carecor Security Service Inc., Respondent

Bargaining Unit - Certification - Security Guard - Employer security firm holding contracts with nine hospitals within Metropolitan Toronto - Union seeking site specific bargaining unit for guards at single hospital - Employer proposing municipal unit - No evidence of substantial interchange of employees between facilities - Board finding union's proposed unit appropriate - Certificate issuing

BEFORE: M. A. Nairn, Vice-Chair, and Board Members D. G. Wozniak and B. L. Armstrong.

APPEARANCES: Donald K. Eady and Eric MacKinnon for the applicant; Barry W. Earle, Carol Hoglund and Robert Hunter for the respondent.

DECISION OF VICE-CHAIR M. A. NAIRN AND BOARD MEMBER, B. L. ARMSTRONG;
August 7, 1991

1. This is an application for certification. Prior to the hearing the parties met with a Labour Relations Officer and were able to resolve a number of issues in dispute.
2. The Board finds that the applicant is a trade union within the meaning of the *Labour Relations Act* (the "Act").
3. Except with respect to the underlined portion, the parties were agreed that all security guards employed by the respondent *at the Toronto East General Hospital*, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation constitute a unit of employees of the respondent appropriate for collective bargaining.
4. It is the position of the applicant that the bargaining unit description ought to include only those employees of the respondent working at a specific location, that is, at Toronto East General Hospital. It is the position of the respondent that the bargaining unit ought to encompass all its employees in the Municipality of Metropolitan Toronto. The parties convened before this panel to deal with that issue.
5. The relevant facts can be summarized as follows. The respondent is engaged in the business of providing security services to institutions in the health care industry. It currently holds contracts with nine hospitals within the Municipality of Metropolitan Toronto. All these contracts are essentially similar in nature and although entered into at different times, operate for a term of one year. One of these contracts is with the Toronto East General Hospital.
6. The employees affected by this application include persons working in the classification of Security Officer II. Although their duties will vary from hospital to hospital depending on circumstances unique to that institution, the essential duties of the Security Officer II are the same. They are responsible for patrolling the institution and ensuring the security of the staff, patients, and visitors. Security Officers I are responsible for the operation of an institution's parking facilities and are employed at only three of the nine locations. Shift supervisors are employed at three of the nine locations. This person acts as a lead hand and the parties agree that the position falls within the bargaining unit.
7. At each location the respondent also employs a facility supervisor. This individual works Monday to Friday on the day shift and is responsible to the respondent for the provision of the security services at that facility. It is agreed by the parties that this individual exercises managerial functions and would be excluded from the bargaining unit pursuant to section 1(3)(b) of the Act.
8. The respondent also employs individuals in the classification of mobile supervisor. These individuals work only the evening shift and, as suggested by their title, travel between the institutions in order to supervise and assist the staff, to conduct some evaluation and training of staff, and they perform a delivery function for reports, memos, and pay cheques. They have on occasion filled in in the event that they are unable to replace an absent employee with someone who has been trained for that facility. The parties are agreed that this position is excluded from the bargaining unit.
9. At the time of negotiating the contract with Toronto East General Hospital, the hospi-

tal requested that the respondent consider whether it could retain a number of the employees who had previously been employed to provide security services for that institution. After a screening process the respondent did in fact hire seventy percent of the individuals who had previously worked at Toronto East General Hospital to continue employment in that facility but for the respondent.

10. The respondent operates out of a head office location in the Municipality of Metropolitan Toronto. Recruitment and hiring of new employees is conducted from that office. While a facility supervisor may recommend or initiate a report with respect to discipline, the actual decision to discipline and/or terminate employment are made at the head office. Personnel records are kept at the head office. The employees in each of the facilities receive the same benefits and enjoy essentially the same terms and conditions of employment. All the employees are issued the same uniforms. There is an orientation provided for new employees at the head office. There is also an orientation conducted in the facility. Training is provided both at the head office and at the facility.

11. Scheduling is arranged at the head office for all facilities. The full-time employees typically work permanent shifts at the same location. The respondent employs part-time employees to work relief shifts and to replace full-time employees absent due to vacation or illness.

12. Scheduling and staffing is done with input from the facility supervisor. For example, if a day shift position becomes vacant it will first be offered to individuals working the evening or night shift at the facility. That initial enquiry would appear to be made by the facility supervisor and the information then passed on to head office. In addition if there are absences due to illness or vacation the facility supervisor would notify the office and again arrangements would be made to cover those shifts. The respondent anticipates that with the installation of a centralized communication system that the assignment of staff will be conducted more efficiently.

13. The mobile supervisors are currently on a pager system and can be contacted by either the facility or by the respondent's employees in the facility. Once a centralized communication centre has been fully installed the facilities will have access to a centralized telephone at the head office and the office will then dispatch as necessary.

14. While this centralized communications system is not yet fully in place, the nature of the respondent's service is such that as a result of standardized reporting systems among all the facilities, the respondent will be able to generate statistical information with respect to incidents for the benefit of all of the institutions that retain the services of the respondent. In addition, the respondent has other programs that it can offer to the various facilities as part of its specialized service.

15. It is apparent that a number of the individuals working as facility supervisors have had experience working in different facilities, whether as a Security Officer II, a mobile supervisor, or as facility supervisor. Vacancies for management positions have been posted in all of the facilities. The assignment of shifts and the scheduling of employees who fall within the bargaining unit have been done according to employee preference as far as the respondent has been able to accommodate everyone. The respondent will assign employees to a facility that is closer to home or to a facility in which the employee is more comfortable. The employer has accommodated requests from employees to transfer from one facility to another for various reasons, for example, to accommodate a request to work a different shift, or to provide an opportunity for the employee to work in another facility in order to help him decide whether he was interested in a promotion in that facility.

16. The respondent submitted a list of all its employees indicating the facilities at which those employees had worked. While the list does show that some employees have obtained experi-

ence working in different facilities it does not support the respondent's position that there is regular interchange of employees between facilities. On occasion a part-time employee working at one facility has worked a shift at another facility. If the respondent has been unable to replace a full-time employee from the available part-time staff at that facility, an employee has been brought in from another facility to cover for that shift. This occurs infrequently.

17. In support of its position respecting a larger bargaining unit the employer relied on a clause in the standard form contract which it signs with each facility. That clause provides a complete discretion to the facility to have the respondent remove any security personnel from that facility. Upon being so advised it is apparent that the respondent would attempt to mediate an arrangement and/or provide additional training to any extent necessary in order to accommodate both the facility and the employee involved. However failing such accommodation the respondent feels it would be obliged to remove the individual from the facility or be in breach of its contract with that facility. The respondent argued that in the face of both this provision and a grievance filed by such an employee, the respondent may well find itself in a "no-win" position; having to reinstate the employee to that facility by virtue of a decision of an arbitrator, resulting in a violation of its other contractual responsibilities. The respondent further argued that an arbitrator would have a greater number of remedial options available to it if the bargaining unit were described to include all employees. The employee could then be transferred to another facility. To date there has been no such demand made by any of the facilities. There was one instance where on the agreement of the facility, the employee involved, and the respondent, a transfer was made. The respondent recognizes that an employee is to be protected from an arbitrary decision by a facility. However, while the respondent may be seeking a balance between its potential contractual responsibilities, we are not persuaded that a larger bargaining unit resolves the dilemma. We are hesitant to place too much emphasis on this aspect of the relationship between the respondent and its customer in considering whether the bargaining unit applied for is inappropriate.

18. The nature of the issue at hand was summarized at paragraph 23 of the decision in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266:

... Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

19. Referring to the more specific question of the geographic scope of the bargaining unit and the considerations which apply, the Board in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250 said:

...

8. Although the Board must be sensitive to the impact of its bargaining unit determinations upon the ability of trade [unions] to organize, there are other factors which must also be taken into account. The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case. ...

9. Nowhere is the balancing of the statutory objectives more evident than in the Board's normal practice of circumscribing the geographic scope of bargaining rights by reference to the municipal boundary within which the employer operates. Where there is only one location within a municipality the Board will define the unit in terms of all employees within the municipality. Under a regime of municipal-wide certification bargaining rights follow an expansion or reloca-

tion of the business within the municipality; but not beyond. The freedom of choice of employees to make the initial selection of a bargaining agent at future sites within the municipality is sacrificed in favour of the stability of the bargaining rights conferred by the certificate. However, these rights do not [extend] beyond the municipality in deference to the right of employees at new locations outside the municipality to select a bargaining agent of their choice. The use of the municipal boundary represents an attempt by the Board to strike a rough balance between stable bargaining structures and individual freedom of choice.

10. Where the employer operates at two or more locations within a municipality at the time of certification a number of other considerations come to the fore which must be taken into account by the Board. Because the operations are in existence the Board is able to make a first hand assessment of the community of interest between the employees at the two locations. ...

11. ... There are other important considerations which enter the picture as well where the employer operates from two or more locations within the same municipality. Where it is raised as an issue the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to bargain collectively. This latter consideration requires the Board to take into account the pattern or organization in the case before it and to balance the pattern of organization against the disruptive effects of excessive fragmentation. The potential for fragmentation takes on an added weight where the Tribunal lacks the authority to restructure existing bargaining units at some future date. The nature of the deliberations which are undertaken by the Board in determining the appropriate bargaining unit where the employer operates from two or more locations within the municipality are summarized in the following passage from the Board's *Ponderosa Steakhouse* decision:

"The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "'bargaining unit' means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them".

This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, *supra*."

...

14. ... The balance which has been struck by the Board in the circumstances of these cases has been aptly described in the following passage from the *Canada Trustco* decision, *supra*,

"In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all."

18. ... Viability for purposes of collective bargaining, on an application of community of interest principles and a consideration of the effect of fragmentation, remains a prerequisite for a finding of appropriateness. However, the Board recognizes that there may be more than one appropriate unit in any given case. Where there is more than one appropriate unit the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively. ...

...

20. In *United Security Limited*, [1982] OLRB Rep. April 644, the applicant proposed a bargaining unit describing one location. The respondent sought a more comprehensive unit of all its employees in Thunder Bay. The employees at the location were engaged in providing security services, specifically, to check baggage and screen passengers at the airport prior to loading and boarding. The Board reviewed the evidence as follows and concluded:

6. ... Thus, there are seven regular employees stationed at the airport and three others who alternate between various locations as need arises. The seven regular employees can also be scheduled elsewhere but this appears to have happened only twice since August of 1981. Thus, the vast majority of their time is spent at Thunder Bay International Airport.

7. Testimony was also received from Leslie Raine, Branch Manager of the respondent in Thunder Bay... He indicated that the company could assign a person working at the airport to work somewhere else. He agreed that the seven employees at the airport were principally located there but said that there was no restriction on the employer moving these people to other locations if it became necessary. Indeed, other than for the Canada Games, the seven persons had worked exclusively at the airport up until the filing of the application for certification. A Mr. Tolmie, who works at the airport, has a dual licence to act as a private investigator and as a security guard. Accordingly, he has been assigned to investigations from time to time both at and away from the airport. Another employee, Mr. Lejeune, was said to have been on patrol away from the airport for roughly one hundred and ninety-eight (198) hours during the month of December and Mr. Lejeune is one of the three additional people who come to the airport on an "as needed" basis. At other times these three employees are either on patrol or providing guard duty services to the mail processing plant...

...

10. This brings us to the bargaining unit configuration problem. The Board usually gives municipal wide bargaining units and does not confine certification to a particular plant or workplace location. However, where there is more than one plant or workplace within a municipal area, the Board must determine whether a single location is appropriate. Where there is no substantial interchange between workplaces or work locations and where the location in question is not so small in terms of the number of employees as to fragment the collective bargaining process unduly and undermine the viability of a particular bargaining unit, a single location will be granted. On the fact before us we cannot conclude that there is substantial interchange or that a unit confined to Thunder Bay International Airport constitutes undue fragmentation resulting in a bargaining unit that is unlikely to be viable.

...

In that case the bargaining unit was comprised of four full-time and three part-time employees. In this case the applicant seeks to represent a bargaining unit of seventeen full-time employees.

21. In support of the more comprehensive bargaining unit the employer relies on the fact that there is a centralization of managerial and labour relations authority, the nature of the work performed at each facility is very similar, the skills of employees are similar and that therefore the employees in the more comprehensive bargaining unit share a community of interest. While that may well be true there is also no doubt that the individuals within the smaller bargaining unit also share a community of interest. As the Board has stated on many occasions, there may well be more

than one appropriate bargaining unit. The issue for the panel is whether or not the bargaining unit sought by the applicant is an appropriate bargaining unit. Both parties focused on the amount of interchange between the employees, the respondent arguing that there was sufficient interchange to support the larger bargaining unit, the applicant arguing that evidence of substantial interchange was required before the Board could find that the unit applied for was inappropriate. While the evidence indicates that various employees have experience at different facilities there is limited evidence of the kind of interchange of employees that would affect a bargaining unit configuration. Employees here are not scheduled for work in each of the various facilities on any regular basis. To the contrary, they are assigned to a particular facility and are employed there subject to a transfer request. While it may be that on occasion an employee from another facility has been utilized when part-time staff have been unavailable the evidence does not support the degree of interchange that would suggest that the bargaining unit applied for was inappropriate. We recognize that there may be some administrative inconvenience created for the respondent by describing the bargaining unit by the specific location. There is also a risk to the applicant that its bargaining rights may disappear if the respondent is unsuccessful in renewing its contract with the facility.

22. In *Famous Players Inc.*, [1990] OLRB Rep. May 509, while the local theatre manager was responsible for certain matters such as hiring, firing, discipline and scheduling, there existed central coordination for training, the setting of wage rates, and for the forms and methods of operation of each theatre. The evidence of the degree and nature of movement of employees between theatres would appear to have been greater than the evidence in the instant case. Having reviewed the case law at some length the Board in that case concluded that it was satisfied that the single location bargaining unit sought by the applicant was an appropriate unit. Although the respondent herein operates a more centralized personnel function we are not, on balance, persuaded that the facts of this case are so distinguishable as to suggest a different result.

23. Having regard to the above we therefore find that all security guards employed by the respondent at the Toronto East General Hospital, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation constitute a unit of employees of the respondent appropriate for collective bargaining.

24. Having regard to the list of employees and to the valid membership evidence filed by the applicant, the Board is satisfied that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 17, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER D. G. WOZNIAK; August 7, 1991

I dissent.

0157-91-U John Craven, Complainant v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128, Respondents

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Complainant alleging bad faith in settling grievance against former employer - Union denying bad faith - Union also pleading delay and arguing that any Board inquiry would be expensive and entirely academic exercise from which complainant could derive no tangible benefit - Board declining to inquire further into complaint - Complaint dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Peter Quinlan* for the complainant; *J. James Nyman* and *Reg White* for the respondents.

DECISION OF THE BOARD; August 8, 1991

I

1. This is a complaint under section 89 of the *Labour Relations Act* filed on April 15, 1991. The complainant alleges that the respondents have contravened section 68 of the Act. The complainant contends that in February 1990 the Union acted in bad faith when it settled a grievance that he had against Mid-Valley Industrial Services, his former employer. The complainant contends that his grievance should not have been settled, but rather, should have been taken to arbitration.

2. The Union replies that there was no bad faith in settling the complainant's grievance in February 1990, and that it is now too late to challenge or unravel a settlement concluded - apparently successfully - some seventeen months ago. The Union further argues that any inquiry would now be an expensive and entirely academic exercise from which the complainant would derive no tangible benefit - other than to provide him with a forum to pursue political grievances which are not properly the subject of a section 68 complaint. In the Union's submission, the Board should exercise its discretion under section 89 not to inquire into this complaint.

3. In order to understand this preliminary submission, it is necessary to sketch in some background. The parties are agreed on the basic facts, and it will be convenient to recite them in approximate chronological order. For ease of reference, Mid-Valley Industrial Services and Texaco Canada Inc. will be referred to simply as "Mid-Valley" and "Texaco". The Union respondents will be referred to collectively as "the Union" unless it is necessary to distinguish between Local 128 and its international parent body. The relevant provisions of the Act are as follows:

89.-(1) The Board *may* authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.

[emphasis added]

* * *

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in

bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

II

4. The complainant is a boilermaker and a member of the Union. Mid-Valley is a "maintenance" company that had a contract with Texaco to perform repair, renovation and maintenance work at Texaco's facilities in Nanticoke, Ontario. To perform that work, Mid-Valley normally employed between six and eight boilermakers. The complainant was one of them.

5. Mid-Valley had a collective agreement with the respondent international union. Strictly speaking, Local 128 is not a party to that agreement, however, it does have certain administrative responsibilities under the agreement. The collective agreement includes the following terms:

ARTICLE 8.000- STEWARD

Each Union signatory to this Agreement may appoint or select one (1) working steward from among the Company employees to act as a representative of the Union in connection with Union business and the job superintendents will be so notified in writing. These Stewards shall be allowed reasonable time to conduct Union business related to this project. The Business Manager of the applicable Local Union shall be consulted in advance of the termination of the Steward.

Steward designations must be confirmed in writing to each job superintendent in order to allow recognition of Steward's privileges.

In such circumstances when the number of craftsmen employed on a project are small, and the appointed Steward does not have the necessary experience, the appointed Steward may be terminated by the Company, when the Business Manager of the Craft Local concerned will arrange the appointment of another Steward.

ARTICLE 5.000 - GRIEVANCE PROCEDURE

5.100 It is agreed that it is the spirit and intent of this Agreement to adjust grievances promptly. All grievances, including discharge for just cause, but not those pertaining to jurisdictional disputes, that may arise on any work covered by this Agreement must be initiated within fifteen (15) working days of the incident by either the employee in Step I or the local union in Step II and shall be handled in the following manner:

• • •

5.105 Step V: If any dispute or grievance concerning the interpretation, application or violation of this Agreement cannot be settled through the procedure described above within ten (10) working days, the matter may be submitted by a Signatory Union to this Agreement or the Company, to a Board of Arbitration for adjudication. This Board shall consist of three (3) Arbitrators, one appointed by each party to this Agreement and the third, who shall act as Chairman, to be selected by the two so appointed.

6. Union stewards monitor the day-to-day application of the collective agreement on the job, and provide advice or assistance to employees if that is required. Under the Union Constitution, the power to appoint or remove these minor officials rests with the Local Business Manager.

7. In 1987 the complainant was involved in an automobile accident, and was off work for four months. Thereafter, recurring medical problems made it difficult to perform the ordinary duties of a boilermaker. In November 1989, on the advice of his doctor, the complainant advised Mid-Valley that he would no longer be able to work.

8. The complainant has been totally disabled since November 1989. It is uncertain when, if ever, he will be able to work at his trade. From November 1989 to the present, the complainant has been receiving disability benefits, payable on the basis that he is totally unable to work.

9. By letter dated January 12, 1990, Mid-Valley wrote to the complainant as follows:

John;

Due to the present reduction in the Boilermaker work load, and in view of the fact that you have not contacted Mid-Valley regarding your extended absence, we consider you to have quit per Article 8 of the Mid-Valley Job Rules.

In accordance with Article 8.000 of the GPC Agreement, Mid-Valley has informed Local 128 of your termination.

Mid-Valley wishes you well and hopes that your health improves to the point where you can re-join the Local 128 work force. Good luck.

Brian R. Simmons
Site Superintendent

By letter dated January 26, 1990, the complainant challenged his purported termination (or lay-off), alleging that it was contrary to the terms of the collective agreement. On January 29, 1990, the Union filed a formal grievance to the same effect:

Dear Mr. Simmons:

Please be advised that the International Brotherhood of Boilermakers is submitting a grievance on behalf of Brother John Craven under article 8.000 and all other related articles.

We feel that Brother Craven had the proper clearance from your company to be absent from work because of a injury sustained away from your project. Brother Craven states that he has contacted your company on different dates with letters from his doctors for an extended leave of absence due to therapy. He was never contacted by your company that this information was not acceptable and Local 128 of the International Brotherhood of Boilermakers will settle this grievance with the Reinstatement of Employment for Brother John Craven when the physician responsible for John Craven releases him from his injury.

If any further information is required with regards to this member, please do not hesitate to contact the writer, I remain

Fraternally yours,

Reg White
Business Representative
Local 128

10. These grievances were resolved in accordance with a letter from the company dated February 20, 1990:

Dear Sir;

With regard to our conversation of February 12, 1990 concerning the grievance filed by John Craven against Mid-Valley for alleged wrongful dismissal.

Mid-Valley does not consider that any part of the GPC Agreement was contravened when Mr. Craven was laid-off, however, we are prepared re-hire [sic] Mr. Craven under the following conditions:

1. When Mid-Valley increases its Boilermaker crew (which is very shortly).
2. That Mr. Craven provide Mid-Valley with a doctor's note indicating that he is fit for work.
3. That the Boilermakers' Union and Mr. Craven provide Mid-Valley with some assurance that he (Mr. Craven) will refrain from conducting any further personal union campaigning business on company time and client premises. Mid-Valley does not want a repeat of the situation which took place in May of 1989 (as reported to your Mr. Joe Maloney at that time) when Mr. Craven, without permission, used our client's photocopying facilities to make several hundred copies of union election forms. The hours expended by Mr. Craven on these forms, to say nothing of the copying costs, were significant.

Brian Simmons
Site Superintendent

11. It will be seen that this alleged "termination" was a little artificial, because the complainant was neither actively at work or able to work at the time it occurred nor able to work at any material time thereafter. In any event, in accordance with the above-mentioned "settlement" the company was prepared to recall the complainant to active employment provided that he was fit for work. The grievor was not then and is not now fit for work.

12. Sometime in the late Winter or early Spring of 1990, the complainant was removed from his position as the union's job steward. The complainant challenges that removal from union office, asserting bad faith, and contending that the loss of steward status impaired his job prospects. The Union replies that the complainant was removed as union steward because he was no longer actively at work on the job, and reiterates that the appointment or removal of stewards is a discretionary power of the Local Business Manager. The Union argues that this is an internal union matter which has nothing to do with the Union's statutory obligation to fairly represent employees in their dealings with their employer, nor is the holding of this minor union position related to the complainant's job security or right to a job. And, of course, this too is entirely academic because he was not, and may never be, able to return to work.

13. Under the Union Constitution, the complainant has filed a variety of charges against various union officers and union members involving, inter alia, the appointment of stewards on the Texaco work site. Those charges were dismissed following a trial in March 1990. An appeal under the International Constitution was also dismissed on May 4, 1990. In June 1990, the complainant ran for the elected office of business manager of Local 128.

14. In June 1990 Mid-Valley lost its maintenance contract with Texaco and left the Nanticoke site. The collective agreement with Mid-Valley also expired in June 1990. Texaco subsequently engaged another company known as "Sheaffer Townsend" to perform maintenance work at Nanticoke.

15. Sheaffer Townsend did not have a collective agreement with the Union covering maintenance work at Nanticoke, nor was Sheaffer Townsend under any obligation to hire any of the employees who were previously working for Mid-Valley. When one subcontractor replaces another on this work site, the new company often hires the tradesmen formerly employed there by its unsuccessful competitor, but it is not required to do so. Nor is it required to give preference to persons on an out-of-work or recall list maintained by its competitors. Sheaffer Townsend is a total stranger to these proceedings and all of the events of which Mr. Craven complains.

16. Local 128 operates a "hiring hall" system by which unemployed members are allocated

job opportunities as they arise. Members receiving disability benefits are maintained on the "inactive list" until they are able to return to employment. At that point they are transferred to the "active list", and are assigned a position on the list which reflects the period that they have been out of work.

17. The complainant has been on the inactive list for some time. If he is ever fit to return to work he will be placed on the top of the hiring hall's active list. He will then be able to choose from among any job opportunities which may arise - including those with companies on the Texaco site. He suffers no penalty if he rejects any of these job opportunities. He stays at the top of the list. In other words, if/when the complainant is able to return to work he will be able to claim any work opportunities then available. And, of course, the Union is under a statutory obligation to run the hiring hall fairly (see section 69 of the Act), so that any alleged impropriety could, at that stage, be the subject of a complaint.

18. As I have already mentioned, this complaint was filed on April 15, 1991. Neither Mid-Valley nor Sheaffer Townsend was named as a party respondent. Nevertheless, it appears that the remedy the complainant seeks involves - albeit very indirectly - some right or preference to continued employment at the Texaco site either by Sheaffer Townsend, Mid-Valley, or whatever maintenance contractor happens to be working there when/if the complainant is fit to return to work as a boilermaker. The complainant was not very clear about where that preference might come from, or what it would be based upon, but he felt sure that, as a first step, the Board should set aside the above-mentioned settlement and direct Mid-Valley and the Union to arbitrate the propriety of his purported termination in January 1990.

19. The complainant's theory of the case requires further elaboration.

20. As I understand it, the complainant's assertion is that the settlement of his grievance (referred to above) was motivated or influenced by "bad faith" on the part of union officials. He seeks a Board direction that his case against Mid-Valley be taken to arbitration in the expectation that an arbitrator might direct his "reinstatement" to a notional inactive list maintained by Mid-Valley. This, the complainant says, would somehow enhance the possibility of employment by Sheaffer Townsend should the complainant subsequently be fit to work. The complainant was unable to say how such arbitration award would significantly alter the situation created by the settlement, or how it was legally relevant to his future job prospects with other companies.

21. Counsel concedes that such arbitration award would have little or no practical significance. The complainant has not lost wages or related benefits because, at all material times, he has been unable to work. Mid-Valley itself has not been on the site since June 1990. The "notional reinstatement" to Mid-Valley's inactive employment roles is quite academic and counsel was unable to explain precisely how a favourable arbitration award would differ from the settlement in which Mid-Valley undertakes to rehire the complainant when he is fit to work. There is no job at the Texaco site to which the complainant may be returned, even if he becomes fit to work, and Sheaffer Townsend, a new contractor, is not bound to employ the complainant in any event. And when/if the complainant is able to return to work, the Local hiring hall rules will give him a right of first refusal on any job openings with any contractor with whom the Union then has bargaining rights. That right is unrelated to the events in 1990 of which Mr. Craven complains, or the terms of the now expired collective agreement.

22. In summary, the scenario envisaged by the complainant appears to be this: litigation before the Board for three or more days focusing on the Union's settlement of his grievance, followed by an arbitration proceeding involving Mid-Valley. That arbitration proceeding against Mid-Valley would focus upon the complainant's purported "termination" and conditional reinstatement.

ment. He seeks an arbitrator's finding that he was unjustly terminated and a direction that he be placed upon a "notional" recall list for potential job openings that, in practice, he was never in a position to claim and which now no longer exist, even as a possibility, because Mid-Valley is no longer on the site. This litigation is necessary, the complainant asserts, because he is entitled to establish that he has been unfairly dealt with by the Union, and does not trust the Union to fairly administer its hiring hall rules when/if he is able to work and wants to return to the Texaco site.

23. In the Union's submission, these layers of litigation would involve substantial public and private cost, with little tangible benefit to the complainant, other than to provide him with a platform to air his personal grievances against the Union. It would entail an examination of questions raised and settled seventeen months ago, and would involve a third party - Mid-Valley - that is not named as a respondent, cannot itself contravene section 68, and which has no practical interest in the outcome of either the alleged unfair labour practice or an arbitration proceeding. And at the end of this process, (apart from a declaration) the complainant would be in precisely the same position as he is today: unable to work, but entitled to make a preferential claim to any work opportunities which arise after he has regained his health. The Union argues that the Board should exercise its discretion under section 89 and refuse to inquire into this complaint because it is too late to attack the settlement or re-examine the events of February 1990, and there is no sound labour relations reason for doing so. In the Union's submission, there is no practical reason to engage in costly litigation of a doubtful claim which, on the most optimistic scenario, would not significantly alter the status quo. In the Union's submission, this complaint is misconceived and vexatious.

III

24. There is no doubt that Mr. Craven is unhappy about the way that he has been dealt with by certain union officials, and that unhappiness has surfaced, in part, in the present complaint under section 68 of the Act. But the fact is, that the events upon which he relies all took place more than a year ago, the settlement he now attacks was not challenged in a timely fashion, and the labour relations circumstances are now quite different than they were in 1990. Mid-Valley has not been on site since June 1990 and the collective agreement with Mid-Valley also expired in June 1990. There is no claim, legal or otherwise, against Sheaffer Townsend which remains a stranger to all of these events, and proceedings. And the terms of the collective agreement upon which the complainant's rights would ultimately turn, contemplates the expeditious resolution of grievances and a referral to arbitration within a couple of weeks. Against that background, the Board cannot ignore the fact that Mr. Craven waited more than a year to file the present complaint, and by that time, the collective agreement had long since expired and Mid-Valley (which, I repeat, is not here named as a respondent) was no longer in the picture.

25. Section 89 of the Act provides a relatively informal and expeditious mechanism for resolving unfair labour practice complaints, but it is important that aggrieved parties bring those complaints to the Board without undue delay. The importance of expedition was discussed in *The Corporation of The City of Mississauga*, [1982] OLRB Rep. Mar. 420 in a long passage to which we might usefully refer:

20. It is by now almost a truism that time is of the essence in labour relations matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized [sic], could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily

settled, will not reemerge [sic] later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E. 3 L.A.C. 980 (Laskin)*; and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

23. The Board has recently had occasion to review its approach to the issue of delay in *Sheller-Globe of Canada Limited*, [1982] OLRB Rep. Jan. 113 - a case which bears some resemblance to the present one, (although there the delay was 2½ years and here it is five). In *Sheller-Globe*, the complainant was discharged in March 1979, and filed her complaint with the Board in October 1981. In between, she had discussions with union and employer officials, she took legal advice (in March of 1979), she filed a complaint with the Human Rights Commission, and in December 1980, she filed a wrongful dismissal action. Finally, two and a half years after the alleged offence, she complained to this Board that her union had not represented her adequately and requested that this Board direct that the propriety of her discharge be considered by a board of arbitration constituted in accordance with the collective agreement in effect at the time her employment was terminated. The Board dismissed the complaint with the following observations:

"13. A delay of the present magnitude carries with it an element of prejudice which is undeniable. Memories fade, and a party's ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it, requiring the litigation of certain events, remains pending. Here the respondent was justifiably under the impression that the grievance route, or any further demands against the union, had been abandoned in favour of other actions against the company. The lingering discussions which the complainant's husband had with Mr. Pattison and the stewards were clearly of an amicable nature; they provided no indication that action would subsequently be directed against the trade union itself, so that notes or other forms of evidence could be more actively maintained. The defence of the employer is *not* the defence of the trade union in these proceedings. The Board would be concerned not with the matter of cause for discharge, but rather the steps which the respondent's officials went through in concluding in their own minds that no grounds for a grievance existed. That defence would turn upon the

recollection and credibility of the respondent's own officials. It might be noted parenthetically that the Labour Board, in administering the *Labour Relations Act*, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time. The Board as a result has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

* * *

15. In the present case, the delay has indeed been "extreme", and the factors put forward by the complainant are insufficient to deliver her from the consequences of that delay. Certainly the Board has no quarrel with the notion of an aggrieved individual investigating other avenues of redress prior to launching a section 68 application with the Board. But a point is reached, after a reasonable period of time, when the individual must decide whether it is going to go against the trade union or not, and if so, then overt steps must be taken in that direction. The individual cannot rely indefinitely on the efforts being taken on his or her behalf in other directions, and then come back against the trade union when those efforts prove fruitless. The important point to note here is that the other forms of action being pursued by the complainant were directed solely against the employer. Not a word was said to the trade union during that period to indicate that its conduct was being viewed as unlawful, or that its own position might still be placed in jeopardy. The complainant will not now be permitted, at this date, to use section 68 against the trade union as a last resort to reach the employer."

Those considerations are equally applicable here, where the complainant seeks to set aside a settlement concluded more than a year before the complaint was filed, and pursue a grievance under a collective agreement long since expired, against an employer that is no longer on the scene.

26. But quite apart from questions of delay, what would be the result of this time-consuming and costly exercise engaging the time of lawyers, public and private adjudicators, and witnesses who might be compelled (by subpoena or otherwise) to testify about what happened in early 1990? Counsel for the complainant concedes that a declaration of a breach of section 68 would have little practical utility and no real impact on the complainant's employment situation, even *assuming* that at some time in the future he is able to return to his trade. The complainant has suffered no monetary losses and the conduct of which he complains neither has had, nor can have, any practical effect on his future employment prospects. Indeed (and paradoxically) it is the Union's internal hiring hall rules to which the complainant may look for preferential hiring rights - not this litigation or an expired collective agreement with a former employer. I am not inclined to give much weight to the complainant's fear that when/if he is fit to return to work at some time in the future, the Union might discriminate against him in the application of its hiring hall rules. If that situation actually materializes, it can be dealt with, in a timely fashion, under section 69 of the Act.

27. For the foregoing reasons, and in the exercise of its discretion under section 89 of the Act, the Board declines to inquire further into this complaint. There may well be situations in which a mere declaration would serve some useful public or labour relations purpose. This is not one of them. The complaint is therefore dismissed.

0168-90-R; 0567-90-G Raymond Thibault, Applicant v. International Union of Operating Engineers, Local 793, Respondent v. **F.H.R. Construction Ltd.**, Intervener; International Union of Operating Engineers, Local 793, Applicant v. **F.H.R. Construction Ltd.**, Respondent

Bargaining Unit - Construction Industry - Termination - Union submitting that termination application be dismissed because it had not been brought by or on behalf of the “employees in the bargaining unit defined in [the] collective agreement” as required by section 57(2) of the Act - Board considering principle in *April Waterproofing Ltd.* decision and finding it inapplicable to circumstances of the case - Representation vote ordered

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *John A. Desotti* and *Raymond Thibault* for the applicant in Board File 0168-90-R; *Craig Flood* and *Michael Quinn* for the International Union of Operating Engineers; *Brian R. Gatien* and *Frank Villano* for **F.H.R. Construction Ltd.**

DECISION OF THE BOARD; August 14, 1991

1. Board File 0567-90-G is a referral of a grievance filed pursuant to section 124 of the *Labour Relations Act* (“the Act”). In it the applicant International Union of Operating Engineers, Local 793 (hereinafter referred to as the Operating Engineers or the union) asserts that the respondent has violated the terms of the Provincial Collective Agreement (“the collective agreement”) to which it is bound by engaging persons to perform work in the industrial, commercial and institutional (“ICI”) sector of the construction industry contrary to the provisions of that collective agreement. As remedy the trade union requests compliance with the provisions of the collective agreement and that wages and benefits owing as a result of the violations be paid to the union in trust.

2. Board File 0168-90-R is an application filed pursuant to section 57 of the Act (“the termination application”) in which the applicant seeks a declaration that the trade union no longer represents the employees of **F.H.R. Construction Ltd.** for whom it is the bargaining agent. That application pertains to the Operating Engineers’ right to represent the employees of **F.H.R. Construction Ltd.** (hereinafter referred to **F.H.R.** or the employer) employed in the ICI sector of the construction industry. Another application by Mr. Thibault for a declaration that the Operating Engineers no longer represent the employees of **F.H.R.** employed in all other sectors of the construction industry in Board Area 17 has already been dealt with by another panel of the Board without a hearing. A vote was conducted with respect to that application and the union’s right to represent those employees was terminated by decision of the Board.

3. These two matters are related to the extent that the trade union submits that the termination application be dismissed because it has not been brought by or on behalf of the “employees in the bargaining unit defined in [the] collective agreement” as required by section 57(2) of the Act. The trade union submits that the applicant and the other employees on the list filed by **F.H.R.** were employed on the application date but should not be included in the bargaining unit because their employment in the ICI sector was in contravention of the collective agreement.

4. The trade union does not dispute the voluntariness of the petition filed in support of the application. The parties are also agreed that the application is timely, that the three persons on the list were employed by **F.H.R.** on the application date, and that they were the only three persons performing work covered by the collective agreement in the ICI sector of the construction industry

on behalf of F.H.R. Thus, the only issue which remained in dispute was the status of the applicant and the other two persons on the list.

5. At the commencement of the hearing and after hearing the submissions of the parties the Board orally ruled that these two matters would not be consolidated but would be heard one after the other by this panel of the Board. We further ruled that we would hear the evidence and representations of the parties with respect to the termination application first. Thereafter, we would hear the evidence and representations of the parties with respect to the referral of the grievance. The evidence heard by this panel of the Board with respect to Board File 0168-90-R would be applied and considered by the Board in dealing with Board File 0567-90-G.

6. At the conclusion of the evidence and submissions in respect of the termination application, the parties agreed and requested the Board to adjourn *sine die* the referral of the grievance pending release of the Board's decision in the termination application. Having regard to that agreement the Board consents to adjourn Board File 0567-90-G *sine die* for a period not exceeding one year from the date hereof. Unless within that time either party requests that the Board proceed with the matter it will be terminated.

7. We heard the evidence of the three individuals on the list and the evidence of Mr. Michael Quinn. Mr. Quinn is the area supervisor for north-eastern Ontario of the Operating Engineers and has been the full-time business representative of the union for this area since November 1970. All of the witnesses were credible and each gave his testimony in a candid and forthright manner. Indeed, there was little conflict in their evidence. Such conflict as existed was the result of the witnesses' individual ability to recollect with precision events or conversations that occurred some time ago. We are of the view that none of the witnesses was motivated by self interest, but rather all openly and genuinely gave their evidence to the best of their ability.

8. F.H.R. is an employer in the construction industry. It operates primarily in the Sudbury area and primarily in the sewer and watermain sector of the construction industry. Although the evidence is somewhat sketchy in this regard, it appears that F.H.R. does not operate exclusively in that sector and has on occasion operated in the residential sector, the road sector and the ICI sector both in and outside the City of Sudbury. Mr. Quinn described F.H.R. as "basically" a sewer and watermain contractor. The employees testified that in the past each had worked on projects other than sewer and watermain including ICI construction projects.

9. The trade union was certified as bargaining agent for the employees of F.H.R. in the ICI sector of the construction industry in the Province of Ontario and all employees of the respondent in the all other sectors in that portion of the District of Cochrane north of the 50th parallel of latitude (Board Area 25) engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, on July 12, 1982.

10. Between July 1982 and 1989 the trade union was never contacted by F.H.R. to dispatch employees from its hiring hall to F.H.R. for work upon any construction project. It also never provided any clearance cards to any persons employed by F.H.R. The union did not receive any dues authorization forms from persons employed by F.H.R. and never received any monthly dues or other remittances from F.H.R. on behalf of any person employed by F.H.R.

11. In April and May 1989 the union was engaged in an organizing drive with respect to the employees of F.H.R. employed within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building (Board Area 17). On or about May 19, 1989 it filed an application for certification. That application did not relate to the ICI sector. On August 21, 1989 the

union was certified to represent employees in Board Area 17 in all sectors of the construction industry, except the ICI sector (for which it already held bargaining rights).

12. Mr. Quinn was the union organizer and he testified about the procedure he normally uses to sign up employees. He indicated that he used this same procedure in signing up the F.H.R. employees including Messrs. Thibault, Lamothe and Labelle, the three persons whose names appear on the employer's list in respect of the termination application. There were minor discrepancies in the evidence of Messrs. Thibault, Lamothe and Labelle and Mr. Quinn as to the conversations that took place at the time of the signing of these applications for membership and thereafter. Based on the totality of the evidence and what is reasonably probable in all of the circumstances we find the following facts.

13. Mr. Quinn spoke to each employee individually at the home of the employee. Mr. Quinn initiated the contact and solicited the employees' support for the union. At the time Mr. Quinn had each employee sign "an application for membership" in the following form:

**APPLICATION FOR MEMBERSHIP
INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 793
Obligation of Membership No. 14458**

I agree to abide by the Constitution of I.U.O.E.

I wish the I.U.O.E. Local 793 to represent me for the purpose of collective bargaining.

NAME BIRTHDATE

ADDRESS

EMPLOYER CLASSIFICATION

SOCIAL INS. # CERTIFICATE

PHONE # BENEFICIARY

I also agree to pay an entrance fee of
and dues per month.

WITNESS SIGNATURE

DATE

I.U.O.E.-LOCAL 793

No.

RECEIPT

DATE

RECEIVED FROM

Applicant's Signature

..... as payment on Initiation Fee

.....
Signature of Union Rep.

14. The amount of \$10.00 is handwritten in the application form in the space following the words "entrance fee of". Similarly, the amount of \$17.00 is handwritten in the appropriate space as the dues per month. Mr. Quinn explained that it was necessary for each person to pay one dollar "to make it legal". He indicated that the one dollar was a "sacrifice" and a reduced initiation fee. The employees were advised that the balance of the \$10.00 initiation fee was payable and would normally be payable when a collective agreement was signed with the employer or, if the employee wished, he could pay it at any time. Mr. Lamothe paid the full \$10.00 initiation fee at the time he signed the application for membership. Mr. Thibault and Mr. Labelle each paid only \$1.00. Each understood that a further payment of \$9.00 would be required.

15. Mr. Quinn explained to each employee how he maintains the confidentiality of these applications for membership. He advised employees that he would not apply to be certified unless he had "signed up" 75 percent of the bargaining unit.

16. Mr. Quinn explained the unions' benefit plan to each employee and left each person a copy of the booklet which outlines the benefits. The employees signed a "green card" for the benefits and in addition were advised that benefits commenced when the employer started to make contributions on their behalf.

17. At the meeting with Mr. Quinn each employee was made aware of the fact that monthly dues in the amount of \$17.00 would have to be paid. They were told the dues would be deducted from their pay-cheques.

18. Mr. Quinn told the employees that they would have to attend a meeting where they would be sworn in. The employees were never provided with a copy of the union constitution which contained provisions with respect to a swearing in ceremony.

19. When the employees signed the applications for membership Mr. Quinn advised the employees that they would receive a membership card in the mail. Each of the employees subsequently received a plastic card which had on it the logo of the trade union, its address and telephone number and the name of the Business Manager and President. Embossed in plastic on this card is the name of the employee, his social insurance number, the number of the Local and a "date applied". The words "probationary member" also appear on the face of the card as does the warning "this card is to be carried at all times." On the back of these membership cards is printed a calendar of months from January 1989 to February 1990. Preceding the months of January 1989 are the words "initiation paid".

20. Although the words “probationary member” appear on the face of the card there was never any discussion between Mr. Quinn and any of the employees about any “probationary” status. Each of the employees testified that they believed that they were members of the union. Indeed some of the employees did not realize that the words “probationary member” appeared on the membership card until after this application for declaration terminating the union’s bargaining rights had been filed and they met with counsel in preparation for the hearing. Mr. Thibault testified that several years ago he was approached by a union representative to sign a membership application. At that time he also paid a dollar. He never however received a plasticized membership card on that occasion. Moreover, when he contacted the union thereafter in an attempt to put his name on the “out of work” list and pay dues he was advised that he could not do so as he was not a registered member of the union.

21. The meeting between Mr. Quinn and the individual employees at their homes was not the only meeting or communications which the trade union had with Messrs. Thibault, Labelle and Lamothe. Meetings and communications between Mr. Quinn and the employees at F.H.R., including the three employees on the employer’s list, continued both before and after the union was certified.

22. At some point prior to the certification all of the employees at F.H.R. had their employment terminated. An employee contacted Mr. Quinn about the matter and a meeting with Mr. Quinn and all the employees took place at the Park Plaza Hotel. The matter was eventually resolved apparently through the intervention of the trade union. All the employees were immediately reinstated having lost less than a full day of work. The firing of the employees occurred on a Friday and their reinstatement occurred the following Monday.

23. Between the date of application and certification each employee also received five letters from Mr. Quinn advising them of the progress of the certification application. Each letter is headed “Dear Sir and Brother” and ends “Fraternally yours”. With the exception of the letter dated June 27, 1989 in which Mr. Quinn states “I have enclosed your new probationary card. Carry it proudly”, there are no references in any of these letters that refer to the employees’ “probationary status”, the constitution, the requirement of the swearing in ceremony, dues or the balance of the initiation fee. Indeed, in our view there are a number of references in the correspondence from which one could reasonably conclude membership in the union. In addition to this personalized correspondence, at various times throughout the year the employees received copies of “The Operator”, a journal published by the union as well as some other bulletins or brochures from the union.

24. The employees also had a meeting with Mr. Quinn at his office. The evidence in respect of this meeting was somewhat vague. From the totality of the evidence we conclude that this meeting occurred after the union had made its application but before the union was certified to represent the employees at F.H.R. At that meeting the progress of the certification application was discussed. The matter of union dues, union benefits and continued support for the union was generally discussed at that time. We also conclude that it is reasonably probable that it was at this meeting that the employees received a copy of the Provincial Collective Agreement, a schedule of the wage rates and information about projects in the area. There is no evidence before us however, to suggest that the details of the union hiring hall or the job security provisions of the collective agreement (including any provisions to contact the hall upon layoff or recall) were ever discussed with the employees at this or at any other time.

25. The employees of F.H.R. also attended a union meeting held at the Orange Hall. That meeting occurred after the union had been certified. This meeting was attended by members of

Local 793 and was not restricted solely to F.H.R. employees. The prime purpose of the Orange Hall meeting was not related to either the certification of F.H.R. or the negotiations of a collective agreement with F.H.R. It was a general meeting to discuss proposals for the upcoming negotiations for the renewal for the "local" sewer and watermain agreement and to discuss local projects. In addition, Mr. Quinn testified that at the time he specifically met with the F.H.R. employees with respect to matters pertaining to F.H.R. It was Mr. Quinn's evidence (which we accept) that the F.H.R. employees were invited to stay while the discussion with respect to the upcoming negotiations for the "local" collective agreement took place.

26. Negotiations with F.H.R. with respect to a collective agreement covering the employer's "sewer and watermain and road building contracts" did not commence until October 17, 1989. A collective agreement between the parties for those sectors was never concluded.

27. Throughout the summer of 1989, Messrs. Thibault, Labelle and Lamothe continued to work for F.H.R. They were each laid off at the end of the traditional construction season in November/December 1989 and were recalled by the employer in late March/early April 1990. Neither F.H.R. nor the employees contacted the union hiring hall at either the time of layoff or the time of recall. As a result, a clearance card was not issued to the employees by the hiring hall upon their return to work.

28. The record of employment issued to the employees at the time of their layoff did not contain a specific date of recall. The evidence discloses however that the layoff and recall of the employees in the Fall/Winter of 1989-1990 was consistent with the pattern of employment which each had experienced with F.H.R. in the past. Messrs. Thibault, Labelle and Lamothe are all long service employees. Mr. Lamothe has worked for the company for six years, Mr. Labelle has worked for F.H.R. or its predecessor for ten years. With the exception of a two-year period when he quit, Mr. Thibault has worked for the company for sixteen years. During the time of their employment with F.H.R. the pattern of layoff in the winter and recall in the spring has been consistent. We note that none of the employees were considered employees for purposes of the application for certification in 1982, the time when the union acquired its ICI bargaining rights.

29. Of the three individuals only Mr. Lamothe paid the total amount of the \$10.00 initiation fee. Both Mr. Thibault and Mr. Labelle paid a dollar when they signed the card, but never paid the remaining balance. None of the three ever paid any monthly union dues to the union. Mr. Thibault and Mr. Labelle testified that each expected that the dues would be deducted from their paycheques and were waiting for that to happen. When dues were not deducted however, none contacted the union to inquire about the matter and none of the employees attempted to pay the dues at their own initiative.

30. The union never arranged for a swearing-in ceremony with respect to these employees. Although aware of the requirement to be sworn in, the employees also never made any further inquiries of the union about such a ceremony. As a result none of the employees were sworn in.

Submission of the parties

31. Counsel on behalf of the applicant employees submitted that the evidence disclosed that the three individuals were members of the applicant. As members employed in the bargaining unit they had status to bring this application. Each had signed an application for membership and paid a dollar and for purposes of the original application for certification had been considered to be members of the union. Each employee genuinely believed that he was a union member as a result of the signing of that card. He argued that after signing the application for membership nothing

occurred which would cause these employees to think that they were *not* members of the trade union. He argued that in fact the opposite was the case.

32. The employees had regular communications with the union about the status of the application for certification. All such communications encouraged and promoted their view that they were union members. They attended meetings with union representatives after the union had been certified to discuss issues of contract negotiations. The union interceded on their behalf when the employer fired the employees. They were given plasticized membership cards.

33. In addressing the position of the trade union that the three were not union members because they had not been sworn in as union members, had not paid any union dues and, in the case of Mr. Thibault and Mr. Labelle had not paid the \$9.00 balance of the initiation fee, counsel for the employees submitted that in these circumstances the union could not raise these “procedural matters” to adversely reflect on the status of the three employees. Counsel argued that the onus was on the union to ensure that any additional criteria needed to become “full” members had been met. He submitted that this was especially so with respect to the swearing-in ceremony which is controlled by the union itself. It is the union which arranges for the meeting at which the ceremony must take place. Similarly, it was submitted that with respect to any other criteria which needed to be fulfilled all the union had to do was “pick up the phone” and advise the employees of the requirements which still needed to be met from the trade union’s perspective.

34. Counsel maintained that the failure of the employees to pay dues or the balance of the initiation fee was understandable and not fatal to the termination application because of the evidence that employees were advised that dues and the balance of the initiation fee would be deducted after a collective agreement with the employer had been negotiated. Counsel asserted that the likely inference of the evidence is that Mr. Quinn believed that the union would soon enter into a collective agreement with F.H.R. covering the sewer and watermain and road sectors of the employer’s operations. As a result he was not going to “rock the boat” by demanding the balance of the initiation fee or the payment of dues. Having solicited the employees to join the union for one dollar, he did not want to alienate the employees by requests for more money. Mr. Quinn therefore continued negotiations with the employer and did not raise with either the employer or the employees any problems about the continued employment status of the employees or the hiring hall principle. It was only after the filing of the termination application that the trade union, using 20/20 hind sight raised these matters of “process” concerning the membership status of the individuals. Prior to the termination application the trade union had been quite content to permit the employees to continue to work for F.H.R.

35. In support of these submissions counsel relied upon, *inter alia*, *Culliton Brothers Limited*, [1983] OLRB Rep. March, 339, *Aero Block and Precast Ltd.*, [1989] OLRB Rep. Feb. 93 and *Pierre A. Gratton Construction Inc.*, [1986] OLRB Rep. Jan. 137. Counsel distinguished *Corecon Construction Ltd.*, [1987] OLRB Rep. Dec. 1480 from the facts in this case. He pointed to such factors as the long service of the employees with F.H.R. and the fact that they had not been hired “off the street” just prior to the filing of the termination application. He referred to the fact that each employee had joined the union and the fact that (unlike Mr. Connolly in *Corecon Construction Ltd.*) the employees of F.H.R. had not consciously refused to follow up matters to complete membership but had in essence been lulled into a course of conduct by the trade union’s own actions. He therefore argued the decision of the Board in *Corecon Construction Ltd.* was not applicable to these facts.

36. Counsel for F.H.R. supported these submissions. In addition, counsel asserted that the

three individuals were employees in the bargaining unit both under the provisions of the collective agreement and within the principles of the Board's jurisprudence.

37. Counsel for the employer referred to Article 3 of the collective agreement. It is entitled "Union Security" and states:

3.1 (a) The Employer shall first call the Union Office whenever personnel are required. If the Union cannot supply such personnel within 48 hours, excluding Saturdays, Sundays and Holidays, the Employer may secure such personnel from any other source. The Employer may recall former regular employees through the Union office who have been absent from the Employer up to twelve (12) months.

(b) Regular employees shall be defined as employees who have been on the Employer's payroll for six (6) consecutive months or more.

3.2 All personnel hired shall be required to have a clearance card issued by the Union before they start to work, unless other arrangements are made with the Union dispatcher. Such clearance card will not be unreasonably withheld.

3.3. Employees working under this Agreement shall be members of the Union in good standing, or make application to become members of the Union within seven days of hiring or be replaced upon written request by the Union.

38. Counsel for the employer asserted that the collective agreement does not necessarily require union membership as a condition of employment. Rather, it is sufficient if employees "make application to become members of the union". In this way the collective agreement incorporates subsection 1(1)(l) of the Act which also refers to "members" as persons who have applied for membership. This each of the employees had done. Counsel argued that the employees had done everything required of them in order to be "employees in the bargaining unit defined in [the] collective agreement" as required by section 57(2) of the Act. There is no evidence to suggest the trade union has made any request that the employees be replaced as permitted in Article 3.3. A grievance was only filed *after* the employees filed the termination application. That grievance is in any event ambiguous with respect to a request that employees be replaced.

39. Counsel further submitted that Article 3.1(a) of the collective agreement did not apply. He asserted that this provision requires an employer to contact the hiring hall when it needs more personnel. Counsel for F.H.R. argued that there is no evidence that F.H.R. required any additional employees. It merely returned to active employment persons who had been temporarily laid off at the end of the 1989 construction season. The evidence establishes that the employees are all long-service employees of F.H.R. with a consistent history or pattern of full-time employment during the construction season, a brief layoff over the winter months and regular recall in early spring.

40. Counsel for the employer further submitted that application of the Board's jurisprudence to the facts of this case also led to the conclusion that these persons were employees with status to bring the termination application. Counsel distinguished *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577, *Inducon Development Corporation*, [1983] OLRB Rep. July 1038 and *Corecon Construction Ltd.*, *supra*. He asserted that the "mischief" which the Board sought to guard against in those cases was not present in the circumstances. Here employees were not hired shortly before the termination application was filed either off the street or from a rival union to foster the application. Neither were the employees continued in their employment after the employer had become aware of a "knowing violation" of the collective agreement as was the case in *Inducon Development Corporation*. Rather, these employees were long-service employees. Over the years of their employment there had not been any request from the trade union for dues or health and welfare deductions. Similarly, there had been no interaction between the trade union

and the employer with respect to a request for, or referral of, persons to work on F.H.R. jobs. In arguing that the mischief was not present in this case counsel for the employer relied upon *Culliton Brothers Limited*, *supra*, *Aero Block and Precast Ltd.*, *supra*, *Pierre A. Gratton Construction Inc.*, *supra*, *Thomas Construction (Galt) Limited*, [1982] OLRB Rep. Nov. 1727 and *Ottawa Greenbelt Construction Limited*, [1990] OLRB Rep. Nov. 1143.

41. In response counsel for the trade union submitted that, for purposes of this collective agreement and this application, the three employees were in fact hired “off the street” immediately prior to the filing of this termination application. Each of the employees had been laid off without any definite date of recall. None had been rehired through the union hiring hall. Counsel described the employees as persons who had a “periodic attachment” to F.H.R. by reason of their past employment with the employer. He argued however, that the employees had their employment terminated each year and were newly hired in the spring of the following year. At the relevant time in the spring of 1990 therefore they were “new hires” who had come to work for F.H.R. and been assigned to an ICI project in breach of the collective agreement.

42. In response to the submissions of counsel for the applicant that application for membership was sufficient for purposes of certification and should be similarly sufficient in this instance, counsel for the Operating Engineers submitted that the *Act* drew a distinction between “union membership” and “membership in the bargaining unit”. Although section 1(1)(l) of the *Act* provides a statutory definition of membership, section 57(2) refers to “employees in the bargaining unit”. Thus, although someone can be a “member” for purposes of an application for certification, that does not make the person an “employee in the bargaining unit defined in a collective agreement”. The Board must look to the collective agreement in order to determine whether a person is or is not an employee in the bargaining unit for purposes of a termination application.

43. Counsel submitted that the three persons on the list were not “employees in the bargaining unit defined in the collective agreement” as required by section 57(2) regardless of whether one looked to the language found in the collective agreement, the constitution of the Operating Engineers, or the *Act* and the Board’s jurisprudence interpreting and applying the *Act* in cases such as *April Waterproofing Ltd.*, *supra*, *Inducon Development Corporation*, *supra*, *Corecon Construction Ltd.*, *supra*.

44. Counsel for the Operating Engineers submitted that Articles 3.1(a) of the collective agreement requires the employer to call the union hall when it requires personnel. He disputed the employer’s position that the article only applied when the employer needed additional personnel. It was his position that in the spring of 1990 the employer required three persons. The three persons were subsequently employed but not recalled “through the union office” and did not have clearance cards by the union as required in Article 3.2 nor where “other arrangements” were made with the union dispatcher.

45. With respect to Article 3.3 of the collective agreement it was asserted that the employees had not made “application to become members of the union within seven days of hiring”. These employees applied to become members in 1989 and not 1990 when they were hired. Counsel argued that in any event Article 3.3 must be read in conjunction with Article 3.2. Article 3.2 requires *all* hired persons to obtain a clearance card from the union.

46. Similarly, with respect to Article 3.3 it was submitted that the employees were not “members of the union in good standing”. As they were not members in good standing they could not be considered “employees in the bargaining unit defined in the collective agreement”. We were referred to various provisions of the union’s Constitution to support this submission. Having

regard to our ultimate determination, we do not find it necessary to detail the lengthy submissions of counsel with respect to the provisions of the Constitution.

47. With respect to the application of the Board's jurisprudence to these facts, counsel for the trade union submitted that a review of the cases indicated that the persons were not employees in the bargaining unit defined in the collective agreement. Counsel asserted that *April Waterproofing Ltd.* continues to be good law and is applicable to the facts at hand. Although the Board has on some occasions made certain exceptions to the *April Waterproofing Ltd.* principle, those exceptions do not apply to these circumstances. This is not a situation where pre-existing employees were "swept in" by operation of statute as in *Inducon Developing Corporation*, *supra*, or *Culliton Brothers Ltd.*, *supra*. Neither is this the case where employees were at work because the union had waived its rights under the collective agreement as was the case in *Aero Block and Precast Ltd.*, *supra*, *E.R. Masonry*, [1988] OLRB Rep. July 668, *Ottawa Greenbelt Construction Limited*, *supra* or *Thomas Construction (Galt) Ltd.*, *supra*.

Decision

48. We find it unnecessary to determine whether these persons were in fact "members of the union in good standing". Regardless of whether these persons were or were not "members" of the trade union in conformity with the constitution of the Operating Engineers, we find that their employment in the bargaining unit to perform work covered by the collective agreement was in violation of that collective agreement.

49. Having regard to the recognition and union security provisions of the collective agreement in their entirety, we have concluded that before the employees commenced work in the spring of 1990 the employer was obliged to contact the union hiring hall and/or the employees were obliged to obtain a clearance card. These obligations were not met. The employment of the three employees was therefore in contravention of the collective agreement.

50. That however, is not the end of the matter for we must determine whether the employment of these persons in the bargaining unit contrary to the terms of the collective agreement precludes the employees from bringing this termination application. That determination involves the application of the Board's decision in *April Waterproofing Ltd.*, *supra*.

51. Briefly stated the decision of the Board in *April Waterproofing Ltd.*, *supra* ("the April Waterproofing principle") appears to stand for the proposition that persons hired contrary to the terms of an existing collective agreement should not be considered employees in the bargaining unit for purposes of a representation application.

52. We do not consider the *April Waterproofing* principle to be applicable to these circumstances. The Board's jurisprudence following *April Waterproofing Ltd.*, *supra*, has indicated that the principle enunciated in that decision has limited application. The principle is not a strict rule. It is a principle which may be applied or not applied in given circumstances having regard to the purpose of the principle. As the Board stated in *Aero Block and Precast Ltd.*, *supra*, at page 98:

15. Thus, it may be seen that the *April Waterproofing* principle does not fit every situation in which employees may be employed in a bargaining unit contrary to the provisions of a collective agreement. The Board has been prepared, in the face of cogent evidence, to look beyond the simple fact that challenged persons were hired contrary to a collective agreement before it decides whether to apply the principle in a particular case. Does the principle have application in the instant case?

53. In determining whether the principle has application to the facts at hand we find it use-

ful to refer to the decision of the Board in *Culliton Brothers Limited*, *supra*. There, the Board stated:

22. The problem raised in *April Waterproofing* is understandably a difficult one given the transitory nature of employment in the construction industry, and the ease with which an employer's hiring practices can alter the composition of the bargaining unit, and undermine established bargaining rights. If an employer intentionally or unintentionally fails to abide by its legal obligation to hire union members, it is relatively easy to create a situation where non-members - albeit perhaps only temporarily - will be in a position to seek termination of the union's bargaining rights or representation by another union. Union members may be denied the opportunity for present and future employment because of the activities of individuals who should not have been hired at all. The potential for abuse, and the obvious unfairness of putting a union's rights at risk because of the views of individuals who should not even be there, underlies the Board's decision in *April Waterproofing*. Why should the rights of union members turn on the speed with which the union can compel enforcement of the collective agreement to eliminate non-members whom the employer has unlawfully employed"? Should the union's rights turn on whether it can require compliance with the agreement through a proceeding under section 124 more quickly than the employees whom it seeks to eliminate can file a termination application under section 57?

23. The approach in *April Waterproofing* recognizes the need to accommodate individual and institutional rights in a way which is faithful to the statutory parameters within which the Board must operate, yet is also sensitive to the requirements of labour relations policy and orderly collective bargaining. No doubt similar considerations influenced the Courts in *Blouin Drywall* and *Maritime Employer's Association* which were referred to in *April Waterproofing*. In *Blouin Drywall*, the Ontario Court of Appeal held that a potential employee in a union hiring hall had certain inchoate employment rights under a collective agreement even though no common-law employment relationship existed. Similarly, in *Maritime Employers' Association*, the Supreme Court of Canada determined that a concerted refusal to refer workers from a hiring hall constituted a strike even though, again, the individuals in question were only potential employees. In both cases the Court acknowledged that common-law employment considerations did not appropriately capture the collective bargaining reality.

24. So did the Board in *April Waterproofing*. The Board recognized that under the Act contractual rights and statutory rights are intertwined so that in some circumstances the employer's abrogation of the former could irreparably prejudice the latter. Individuals improperly hired could repudiate the statutory rights of those who should have been hired. In the Board's view, this result was inconsistent with the intended meaning of the opening words of section 7, and the statute was interpreted in that light. Of course, the Board might equally have said that it would not schedule a representation vote until the composition of the bargaining unit was in accordance with the legal requirements of the collective agreement; however, the Board considered it more appropriate and direct to treat individuals improperly hired (i.e., in the bargaining unit contrary to its contractual requirements) as not being members of the bargaining unit for the purposes of a representation application.

25. There can be little doubt that if an employer, in contravention of its contractual obligations, hires particular employees in order to foster a representation application, he will be breaching section 64 of the Act which prohibits employer interference in the formation, selection, or administration of a trade union. Indeed, where an employer has retained in its employ individuals who have been illegally hired, there may well be an onus of explanation cast upon the employer to satisfy the Board that it did not continue the employment of the disputed individuals "artificially" for the purpose of influencing a potential representation application or representation vote. For example, in *Custom Aggregates*, [1978] OLRB Rep. March 215, the Board determined that a new vote should be held where an employer artificially kept certain strike replacements employed because they were likely to vote against a union in a termination application.

26. Section 89 offers one remedy for such abuses. There are others. Where the employer has fostered a raid by hiring adherents of a rival union, the Board will probably raise a "section 13" bar on the grounds that the raiding union has been the recipient of employer support. And

where the employer action has resulted in a termination application, the Board may consider both its powers under section 89, and its general authority with respect to the timing, composition, and even number of required representation votes. To these express propositions, the Board adds one more by virtue of its decision in *April Waterproofing*: where the composition of the bargaining unit defined in the collective agreement is contrary to its terms because of the actions of the employer party, the Board will not consider the individuals improperly engaged to do bargaining unit work, as properly part of the unit for the purpose of a representation application. Individuals illegally hired, transferred or retained in the bargaining unit should have no more right to bring a representation application or vote in it, than they would have if they had been properly engaged in accordance with the terms of the applicable collective agreement, or if the Board had postponed a determination of their rights in a representation application until the composition of the bargaining unit is returned to what it should be.

27. The instant case, however, does not exhibit the “mischief” with which the Board was concerned in *April Waterproofing*. The employer here has not hired persons contrary to the terms of a collective agreement, improperly transferred individuals into the unit contrary to the agreement, or engaged in other activities which undermine the contractual rights of union members under the agreement by which the employer is bound. Here, the subject employees were not “hired” at all. The individuals affected were pre-existing employees who were swept into the ambit of collective bargaining by operation of law. Nor is this a case where the employer has manipulated its employee list, withheld information from the union or the Board, or sought to mislead the union with respect to its employee complement to gain the advantages of unionization, only to take a different position in a subsequent termination application. There was no positive action by the employer here which would raise any concerns or call into play the reasoning of the Board panel in *April Waterproofing*. And, given the uncertainty surrounding the rights and status of the individuals affected by this application, we are not prepared to conclude that the fact that Culliton kept them in its employ constitutes improper interference or support which prejudices their right to seek termination of the union’s bargaining rights. While there may be cases where the retention of employees, despite a challenge to their status, may warrant careful scrutiny by the Board lest the employer is “padding the list”, we are not convinced that this is one of them. Nor are we satisfied that the approach in *April Waterproofing* should be adopted here.

54. As was the case in *Culliton Brothers Limited*, *supra*, we do not view these circumstances as exhibiting the “mischief” with which the Board was concerned in *April Waterproofing Ltd.*, *supra*.

55. We do not agree that these persons should be considered as “new hires” or persons who had been hired off the street just prior to the termination application because each employee had received a notice of lay-off without a specified date of recall. In our view, here the employer simply recalled in the spring the employees in its employ who had been laid off in the winter in the same manner as it had done in the past. Indeed, the evidence shows that at least one employee (Mr. Thibault) returned to work in the spring of 1990 at the exact same project from which he had been laid off in the winter.

56. Although the failure to obtain clearance cards or contact the union hiring hall prior to the recall of the employees in the spring of 1990 was a violation of the collective agreement, in the circumstances of this case we view that violation to be a “technical” violation of a pro forma requirement which should not adversely affect the status of these employees to bring this termination application. The collective agreement acknowledges the employer’s right to recall “regular employees”. The three persons on the list meet the definition of a “regular employee” (article 3.1(b)). Although the employer recalled these “regular employees” without conforming with the procedure specified in the collective agreement, in the circumstances we do not view that procedural flaw to be fatal to the termination application.

57. We find that there was no “positive action” taken by the employer which raises the dangers which the *April Waterproofing* principle was designed to guard against. The employer merely

recalled to its active employment its long service employees who had been in its employ when the union was certified in the summer of 1989, and who had continued in its employ throughout that summer without any complaint or challenge by the union. After certification in the summer of 1989 the union, although fully aware of the situation did nothing to protest the continued employment of the persons whom it now asserts are not "members of the union in good standing". It did not for example require employees to obtain clearance cards. In these circumstances, having apparently been content with the circumstances throughout the summer and fall of 1989 as it awaited the signing of a sewer and watermain collective agreement, the trade union cannot at this stage and after the filing of the termination application be heard to complain that the situation it permitted to develop continued to exist.

58. There is no evidence to suggest F.H.R.'s actions were designed to foster a representation application. There was no artificial padding of the list, no artificial continuation of employment and no manipulation of the employee complement in order to support, foster or influence a potential termination application. F.H.R. simply continued its business in the same manner as it had done in 1989 (and previous years) when there had been neither follow up nor objection by the union. Although the *April Waterproofing* principle does not apply only to such situations, the facts and circumstances of this case are far removed from those instances where an employer deliberately hires persons who are antipathetic to the union in order to promote a termination application. In our view the employer's failure to recall "through the union office" ought not to prejudice the rights of the employees who brought this application.

59. With respect to its relations with the employees there was also no follow up by the trade union. The union was fully aware that persons who were not in its view "members in good standing" were employed by an employer for whom it held bargaining rights. Indeed it used the applications for membership of these very persons to obtain its bargaining rights in Board Area 17. Yet the union did not take any steps to ensure that these employees had complied with those requirements which it now asserts are mandatory such as the full payment of initiation fees or the payment of monthly dues. The evidence is to the contrary. The employees were advised that the full initiation fee was normally due upon signing a collective agreement (an event which never occurred) and that dues would be deducted directly from their pay-cheques. Having indicated that it was prepared to wait for the full payment of the initiation fee or payment of dues until the signing of the collective agreement, the union cannot now rely upon the non-payment of these fees to argue that persons otherwise employed in the bargaining unit defined in the collective agreement do not have the requisite status to bring this application.

60. On the basis of the evidence and representations before us we are satisfied that not less than forty-five per cent of the employees of F.H.R. Construction Ltd. in the bargaining unit at the time the application was made had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on May 18, 1990, the terminal date fixed for this application and the date the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining the number of employees who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the Act.

61. The Board directs that a representation vote be taken of the employees of F.H.R. Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non working foremen and persons above the rank of non working foreman. All those employed in that

bargaining unit on August 14, 1991 who are so employed on the date the vote is taken will be eligible to vote.

0929-88-JD International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local, 128, Complainant v. Labourers International Union of North America, Local 1089 and **Foster Wheeler Limited**, Respondents v. Metropolitan Toronto Demolition Contractors Association, Intervener

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Board dealing with preliminary matters including parameters of area past practice evidence - Board declining to hear *viva voce* evidence about evidence sought to be introduced in hearing of merits - Board determined to "draw the line" to evidence which relates to or can be tied to the actual work in dispute - Evidence sought to be adduced by Labourers ruled not relevant

BEFORE: *Louisa M. Davie* Vice-Chair, and Board Members *J. Trim* and *N. A. Wilson*.

APPEARANCES: *Michael A. Church* and *Edward Power* for the complainant; *S.B.D. Wahl* and *R. Leone* for Labourers International Union of North America, Local 1089; *Robin McDonald* and *Jack Brochu* for Foster Wheeler Limited; *S. C. Bernardo* and *Bill Greenspoon* for the intervener.

DECISION OF THE BOARD; August 2, 1991

1. This is a complaint filed under section 91 of the *Labour Relations Act* ("the Act"). This panel has been assigned to hear the merits of this complaint. For ease of reference the parties to this proceeding will be referred to as the Boilermakers, the Labourers, Foster Wheeler, and the MTDCA for the Metropolitan Toronto Demolition Contractors Association.
2. This matter came on for hearing before this panel of the Board on May 21, 1991. The purpose of the hearing was to hear "the evidence and representations of the parties with respect to any an all issues arising in this matter including but not limited to any preliminary matters, the order in which the parties will proceed, the continuation dates for the hearing and the merits of the complaint filed."
3. At the commencement of the hearing the parties raised as "preliminary matters" the order of proceeding, the number of hearing dates required and the scheduling of such dates, and the parameters of the evidence of area past practice. Another issue raised by the applicant Boilermakers concerned the applicability to these proceedings of both the "demolition agreement" between the Labourers and the MTDCA, and the Labourers Provincial Agreement with respect to construction in the industrial, commercial and institutional sector of the construction industry. It was agreed however that this issue would be addressed by the parties during the course of these proceedings and would not be dealt with on a preliminary basis.
4. We note that during the course of the submissions by the parties with respect to these preliminary issues, counsel for the Labourers raised the propriety of Board Member N. A. Wilson sitting on this panel to hear this complaint. Mr. Wilson was previously an International Represen-

tative for the International Association of Bridge, Structural and Ornamental Iron Workers ("the Ironworkers"). The pre-hearing conference memorandum, the submissions of the parties and the experience of this panel indicate that structural steel is a component both in the erection and dismantling or demolition of boilers of the type involved in this jurisdictional dispute complaint. Counsel for the Labourers stated that he did not object to Mr. Wilson's presence on the panel and did not wish to raise any apprehension of bias allegation but felt obliged to bring the matter to the attention of the Board and the other parties because evidence with respect to the trade jurisdiction of the Ironworkers could/would be led in evidence in this proceeding. This matter was then canvassed by the Board with the other parties. None of the other parties objected to Mr. Wilson as a member of this panel and none raised any apprehension of bias concerns. Accordingly we continued with the hearing.

5. With respect to the order of proceeding the parties have agreed that Foster Wheeler will lead its evidence first. Thereafter the Boilermakers will present their case followed by the Boilermaker Contractors' Association of Ontario if that association chooses to actively participate in these proceedings, the Labourers, and finally the MTDCA. Appropriate rights of cross-examination and reply will be afforded to the parties in accordance with their agreement regarding the order of proceeding.

6. With respect to the number of hearing dates required to hear this complaint the parties agreed that twenty days would be required.

7. Thereafter the Board dealt with the third preliminary matter raised by the parties (more specifically raised by the Labourers) regarding the parameters of past practice evidence to be adduced and admitted in the adjudication of this complaint. In this regard the panel was referred to its earlier decision in this complaint reported at [1989] OLRB Rep. February 128 ("February 1989 decision"), the request for reconsideration of that decision dealt with by the panel in its decision reported at [1989] OLRB Rep. May 451 and the unreported decision of the High Court of Justice, Divisional Court, rendered on May 11, 1990 in the application for judicial review of those decisions filed by the Labourers.

8. We note that the Labourers did not specifically seek to raise this matter on a preliminary basis. Counsel for the Labourers was content to have the matter dealt with as it arose during the course of the hearing when the Labourers would seek to adduce evidence which fell beyond the scope of the parameters of the evidence set out in our earlier decisions. The other parties to this proceeding however (and more specifically the Boilermakers) indicated that they would present their case on the basis of the evidentiary ruling made by this panel in our February 1989 decision. The Boilermakers therefore submitted that it reserved its right to reply to any evidence adduced by the Labourers which went beyond the scope of that evidentiary ruling if the Board determined to depart from its earlier ruling. Counsel for the Labourers indicated that he would object to such reply evidence.

9. Having regard to these positions of the parties and the history of this proceeding to date we directed that the issue with respect to the parameters of the evidence of area past practice to be adduced in this matter should be dealt with on a preliminary basis.

10. Jurisdictional disputes have consumed an ever increasing and disproportionate amount of the Board's resources. The length of the hearing to adjudicate upon a jurisdictional complaint has increased significantly over the past several years to the point where hearings lasting fifteen days or more appear to be the rule rather than the exception. As a result, panels of the Board hearing jurisdictional disputes have found it necessary to become increasingly interventionist to control the proceedings which take place before it. Practice has shown that it is more expeditious

to deal with rulings such as the parameters of past practice evidence on a “preliminary” basis after hearing the representations of the parties as to the evidence which the parties desire to adduce and the purpose for which such evidence is sought to be adduced.

11. After directing the parties to proceed with this matter on a preliminary basis the Board heard submissions of counsel for the Labourers supported by counsel for the MTDCA that it would be necessary for the Board to hear *viva voce* evidence in order to properly determine the scope of the past practice evidence which it should admit in the hearing of this complaint. Counsel for the Labourers desired to adduce evidence to show that the parameters to the evidence set out in our February 1989 decision were “irrelevant” and had “no cogency”.

12. Counsel for the Boilermakers and Foster Wheeler opposed the Labourers request to lead evidence on this evidentiary issue. They submitted that *viva voce* evidence was unnecessary and irrelevant to any motion concerning the appropriate parameters of area past practice evidence.

13. After hearing the submissions of the parties as to whether we should, in effect, permit counsel for the Labourers to adduce *viva voce* evidence *about* the evidence which he seeks to adduce in the hearing of the merits of this complaint we rendered the following unanimous oral ruling:

Counsel for the Labourers has raised an issue with respect to this panel’s ruling rendered February 1989 regarding the parameters of the evidence. We have determined that this issue should be dealt with on a preliminary basis.

Counsel submits that the ruling which was made in February 1989 (which was as he termed it, made in a “procedural continuum”) was flawed as the Board cannot determine the parameters of relevant evidence in a vacuum. He asserts the Board should now hear certain evidence which he submits will show that there is “no cogency” to the lines of demarcation in the scope of evidence which the Board has drawn in its decision dated February 15, 1989.

In particular, for example, counsel for the Labourers wishes to adduce evidence to show that there is no relevant or cogent difference between whether the boilers were originally erected using Boilermakers or not, and that there is no significant distinction between the demolition of the work in dispute and other forms of demolition. Counsel wishes at this stage to adduce *viva voce* evidence in support of his submissions that there is “no cogency” to those parameters of the evidence established by this panel in our February 15, 1989 decision.

We are not prepared to hear such evidence. In our view there is nothing unique about excluding proposed evidence on submissions of counsel without hearing that evidence. In fact, having heard the submissions of counsel for the Labourers it is difficult to distinguish the evidence which he wishes to adduce in support of a motion with respect to the parameters of the evidence, from the evidence which he wants to adduce in the hearing of the merits of this complaint. We do not consider it necessary or relevant to hear such evidence for this motion.

We note further that even if the evidence sought to be adduced is as described by counsel for the Labourers, such evidence would be irrelevant or at best of such marginal relevance that it should not be admitted because, on balance it cannot assist in the adjudication of the issue in dispute in this complaint.

No purpose can be served by this Board hearing the *viva voce* evidence which Mr. Wahl wishes to adduce in support of his motion at this time. On the other hand if there are new or further submissions about the scope of the evidence which the parties wish to make, submissions which were not made or considered by this Board at the hearing on February 2, 1989 or the request for reconsideration dealt with in the Board’s decision dated May 24, 1989 we will entertain those submissions at this point of the proceedings.

14. The “procedural continuum” referred to in the submissions of counsel for the Labour-

ers was defined by counsel for the Labourers as the absence of notice or the inadequate notice given to the parties prior to the hearing convened to determine the parameters of the past practice evidence on February 2, 1989.

15. We do not intend to detail the lengthy submissions made by the parties in respect of the parameters of the evidence. Suffice it to say that they were the same, or substantially similar, to the submissions made at the hearing on February 2, 1989 or in their correspondence with respect to the request for reconsideration. There was nothing new in any of the submissions.

16. Counsel for the Labourers did argue that because of the “procedural” flaw with respect to the lack of adequate notice, this panel’s decision dated February 15, 1989 and the request for reconsideration of that decision were void ab initio. Submissions regarding the scope of past practice evidence therefore should not be dealt with under the rubric of a request for reconsideration but rather as an initial determination of the issue. Counsel argued that the hearing on May 31, 1991 was the first occasion on which the Board could consider the matter after proper notice had been given to all the parties.

17. Counsel for the Labourers asserted that the May 11, 1990 decision of the Divisional Court was “significant” because it dismissed the application for judicial review solely because it was “premature”. In so doing the court observed

“There is no clear evidence before us that the panel has or will refuse to admit and consider all evidence presented by the parties that is relevant and otherwise admissible and to hear the submissions of counsel relevant to the issues as set out in section 102(13) of the *Labour Relations Act*.”

18. It was submitted that this was an admonition by the Divisional Court that the merits hearing panel must determine the issue of relevant evidence and must do so after affording the parties the rights set out in section 102(13) of the Act. Counsel reiterated that this includes a requirement to hear the evidence which addresses the scope of evidence to be adduced during the merits hearing before determining its relevance and weight.

19. Counsel argued that if we were not going to hear *viva voce* evidence before determining the parameters of past practice evidence, the Board must assume that the evidence which the Labourers’ seek to introduce exists and can be proven. He submitted that if the Board makes that assumption then it is readily apparent that in order for the Labourers union to present its case that the pervasive area practice in Board Area 2 is that demolition of structures for scrap is the work of the Labourers’ union, evidence beyond the parameters set out in our decision dated February 15, 1989 is relevant and necessary. If for example the Board assumes (as counsel submits we must) that there is no difference between the demolition of the work in dispute and other forms of demolition, then it is readily apparent that excluding evidence about such other forms of demolition is inappropriate and arbitrary. He argues the same holds true for any ruling which excludes evidence of the demolition of other boilers which were not field erected, or which are not steam generating or which were not originally erected using Boilermakers. Counsel asserts that if we assume (as counsel submits we must) that the Labourers’ can prove that “demolition for scrap” falls within the jurisdiction of the Labourers, then we must inevitably conclude that the lines around the past practice evidence which we have drawn in our February 1989 decision are neither cogent nor reasonable.

20. Counsel argued that by not allowing such evidence to be introduced the Board was acting in breach of the rules of natural justice by denying one party the right to present its case. He submitted that the “arbitrary” parameters to the evidence set out in our February 1989 decision

constituted a predetermination of the relevance and weight of the evidence. The Board can not in the abstract and without hearing any evidence on the matter determine that the evidence which the Labourers seek to adduce is not relevant or has no weight.

21. In general terms however, and with the possible exception of the explicit submissions of counsel for the Labourers that the Board must hear evidence before determining the relevance and weight of that evidence, the submission by counsel for the Labourers were the same as those previously made at the hearing on February 2, 1989 or in the submissions to the Board in the request for reconsideration of the February 1989 decision.

22. Similarly, with the possible exception of the explicit acknowledgement by counsel for Foster Wheeler and the Boilermakers that the Labourers do perform demolition work which falls outside the parameters of the February 1989 ruling (i.e. demolition not involving field erected, steam generating boilers for industrial application in an operating environment) the submissions of Foster Wheeler and the Boilermakers remained the same. In particular the Boilermakers asserted it was irrelevant to an adjudication of the proper assignment of the work in dispute in this case that the Labourers had performed other demolition work not in dispute. The Labourers could not use a claim to, or performance of, work *not* in dispute to claim work that is in dispute. Counsel for the Boilermakers also disputed the interpretation which counsel for the Labourers sought to put on the decision of the Divisional Court dated May 11, 1990. It was his position that the decision of the Court merely stood for the proposition that the judicial review application was premature.

23. We agree that a panel hearing the merits of a jurisdictional dispute complaint filed with the Board must “give full opportunity to the parties... to present their evidence and make their submissions”. In our view that is the only conclusion that can be made from a proper interpretation of the decision of the Divisional Court, section 103(12) of the Act and an understanding of the rules of natural justice.

24. In our view however there is nothing in the decision of the Divisional Court, the provisions of the Act, or the rules of natural justice which compel the Board to hear irrelevant evidence or evidence which can have no probative value to an adjudication of the issues in dispute. The discretion given to the Board in the Act including sections 106(1), 102(13) and 103(2)(c) gives the Board inherent jurisdiction to determine what evidence may be relevant or have probative value to the adjudication of a complaint. That discretion does not derogate from the rights of the parties to be heard.

25. We concur with the decision of the Board in *Acco Canadian Material Handling* [1990] OLRB Rep. Sept. 915 where the Board stated:

5. Past practice evidence is only relevant to deciding the proper assignment of work in dispute if it can be tied in with the actual work in dispute. At the same time, the scope of past practice evidence should not be so narrow as to interfere with the party's full opportunity to present its evidence and make its submissions on the issue of the proper assignment. That raises the question of where is the sensible place to draw the line as to the past practice evidence to be heard. In the instant proceeding, in the Board's view, limiting past practice evidence to the two types of conveyor systems was that place. This is because the two systems include a sufficient variety of conveyors which might arguably be included in the term "monorail conveyor" so as to allow the parties full opportunity to present their evidence and make their submissions respecting the conclusions to be drawn by the Board from past practice.

[emphasis added]

26. In our view, section 91 authorizes the Board to inquire into a complaint involving the assignment of “particular work” and not “work” in the abstract. Evidence must therefore relate to

the work in dispute. We consider evidence of the demolition of other structures, (structures other than field erected, steam generating boilers in an operating environment) not to be relevant to the adjudication of this complaint.

27. The jurisdictional dispute complaint in this case is between the Boilermakers and the Labourers. Each trade union asserts a competing claim to the work. In order to determine that claim it is neither necessary, relevant, nor helpful to consider the assignment or performance of other work not in dispute but which perhaps may involve competing claims between the Labourers or Boilermakers and other trade unions.

28. It could perhaps be said that the past practice evidence of the demolition of other structures is arguably relevant because it deals with what loosely may be termed as "similar facts". Counsel for the Labourers wants to adduce certain evidence which he asserts is arguably relevant given the theory of his case and asserts that the evidence should be admitted, considered, and ultimately weighed by the Board at the conclusion of the case.

29. In jurisdictional dispute complaints in the construction industry the evidence of past practice is almost limitless. If counsel for the Labourers' submission is taken to its logical extreme any party could seek to introduce *viva voce* evidence of each and every construction project at which the work in dispute, *or work arguably analogous* to the work in dispute has been performed. The Board must draw a sensible line of what is relevant to a fair and proper adjudication of the issues in dispute somewhere.

30. The work in dispute in this case is very specific. It is the demolition of a particular structure in a particular environment. It is not demolition generally, or "demolition work" in the abstract. Evidence of demolition of other structures in other environments is, at best, collateral to the dispute between these two unions over this work. The statutory provisions which govern the admission of evidence by the Board (see for example sections 102(13) and 103(2)(c) of the Act and section 15 of the *Statutory Powers Procedure Act*) and the rules of natural justice require that the Board hear relevant evidence. These statutory provisions however do not require the Board to hear evidence which is "arguably" relevant especially where the limited value of that evidence is far outweighed by the time and expense which would occur if the parties were to embark on adducing such additional evidence which is only collateral to the issue in dispute. In our view there is not a sufficient nexus between the "demolition" evidence which the Labourers want to adduce and the actual work in dispute. We have determined to "draw the line" to evidence which relates to or can be tied to the actual work in dispute. Even within the parameters of the February 1989 decision the parties have indicated they will require twenty hearing dates.

31. Section 91 is a method by which trade unions and employers can resolve disputes over trade jurisdictions without resorting to self help remedies. It is a means of securing industrial peace and harmonious labour relations without harmful work stoppages. The value of section 91 as a means of achieving industrial peace in the construction industry is seriously undermined if the resolution of jurisdictional complaints takes months or even years of expensive litigation to resolve. The resolution of jurisdictional complaints will become even lengthier and more costly if the parties embark on these collateral avenues of evidence. We do not propose to admit irrelevant evidence, or collateral evidence which is, at best only "arguably" relevant but which ultimately can have little, if any impact upon the issue in dispute.

32. As the panel hearing the merits of this complaint we have considered the evidence which the Labourers seek to introduce. We have considered its "arguable relevance" and have determined that, even if the evidence was admitted and proven, it is not relevant and can't assist in the adjudication of this complaint.

33. Finally we wish to correct an apparent misinterpretation by one or more of the parties of our February 1989 decision. That decision refers to boilers "originally erected using boilermakers". Contrary to the apparent understanding of one or more of the parties it was not the intention of the Board to limit evidence to boilers which were originally erected using *only* boilermakers. We view the demolition of steam generating boilers which were originally erected using boilermakers together with other trades including, for example the Ironworkers or the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada to be relevant and admissible.

34. We find it unnecessary to determine whether our decision herein is an "initial determination" because our February 1989 decision was void ab initio, or whether our decision herein is a reconsideration of that earlier decision. However characterized, and after considering the submissions of the parties both at the hearing on May 31, 1991 and at earlier stages of this proceeding, we have determined that the evidence of the parties which goes toward the criteria of area past practice and employer past practice should be limited to evidence relating to field erected, steam generating boilers, for industrial application, originally erected using boilermakers, which were or are being dismantled or disassembled in an operating environment in the Province of Ontario.

35. At the hearing on May 31, 1991 we set the following dates to continue the hearing of this matter: December 2, 4, 1991, January 7, 8, 9, 14, 15, 22, 23, 28, 29, and 30, 1992. The parties have requested eight additional days. Those are to be set by the Registrar.

2765-90-U Sheet Metal Workers' International Association, Local 473, Complainant v. J.M.R. Electric Ltd., Respondent

Remedies - Unfair Labour Practice - Employer refusing to permit grievors to participate in hiring process because of their union membership - Complaint upheld - Matter of remedy remitted back to the parties for resolution

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *K. Davies*.

APPEARANCES: *J. Raso*, *John Brennan* and *Lorne Cudmore* for the complainant; *Paul Brooks* and *John Rasenberg* for the respondent.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER K. DAVIES; August 26, 1991

1. This is a section 89 complaint in which the Sheet Metal Workers' International Association, Local 473 (hereinafter referred to as "Local 473") alleges that J.M.R. Electric Ltd. (hereinafter referred to as "J.M.R.") has contravened section 66 of the *Labour Relations Act* in its dealings with J. Brennan and L. Cudmore.

2. It did not take a long time to hear the evidence of the three witnesses who testified given the issue in dispute between the parties. J. Rasenberg, the owner of J.M.R., gave evidence on behalf of J.M.R. Brennan and Cudmore testified in support of the complaint. The Board has carefully reviewed the oral and documentary evidence and the parties' submissions relating thereto.

3. Brennan and Cudmore are both experienced journeymen sheet metal workers who live in London, Ontario. Both men have worked in the trade for at least twenty years. During this time, they have been members of Local 473 and for the most part have worked on union jobs. J.M.R. is an electrical and mechanical contractor located in Exeter, Ontario. Its mechanical operation is staffed with plumbers and sheet metal workers. On November 16, 1990, J.M.R. placed an advertisement in the London Free Press for licensed sheet metal workers, fourth and fifth term apprentices and provided a telephone number for prospective applicants to call. Brennan and Cudmore saw J.M.R.'s ad on November 16, 1990 and responded by calling J.M.R. shortly after the noon hour on that day. Brennan and Cudmore briefly spoke to Rasenberg. What Rasenberg allegedly said to both men forms the basis of this complaint. The evidence of Brennan and Cudmore concerning what was discussed during the telephone conversation and the evidence of Rasenberg in this regard differs considerably.

4. In essence, the evidence of Brennan and Cudmore concerning the conversation each had with Rasenberg is similar. Cudmore and Brennan asked Rasenberg about employment as sheet metal workers with J.M.R. Rasenberg asked both of them questions about their work experience. When Cudmore and Brennan disclosed the companies they had previously worked for, it was clear that both men were members of the Sheet Metal Workers Union. Rasenberg asked both men whether they were unionized sheet metal workers and they confirmed that they were. Rasenberg then advised them that he was not hiring any unionized sheet metal workers. Cudmore and Brennan testified that they were acting independently in calling J.M.R. Shortly after the conversation with Rasenberg, both men called their union representative about work and mentioned their telephone conversation with Rasenberg. Their union representative asked both of them to make a note of the conversation and both of them complied with this request. The notes made by Cudmore and Brennan of their telephone conversation with Rasenberg were filed and marked as exhibits in this proceeding.

5. Rasenberg testified that he received numerous telephone calls in response to J.M.R.'s ad. It was the usual practice to have any employment enquiries directed to him. Rasenberg stated that all callers were asked to fill out an application or to send in a resume. On the basis of the application or resume it was decided who would be interviewed. He testified that he remembered the two telephone calls at issue. Although he could not recall which call came first, Rasenberg recalled that the first caller did provide a list of places where he had worked. The caller did confirm that the employers were all union companies. Rasenberg then stated that he advised the caller that J.M.R. is a non-union shop and asked whether the caller needed permission from the union to work there. The caller replied that obtaining permission would not be a problem. Rasenberg recalled the second call did not take as long as the first. He testified that he told both of these callers to send in an application or a resume.

6. J.M.R. hired three sheet metal workers between November 30, 1990 and December 10, 1990. The Board did hear a considerable amount of evidence from Rasenberg concerning all of the applicants, their qualifications and why he hired the three individuals. He testified that he did not consider Cudmore and Brennan for employment since they did not send an application or a resume to J.M.R.

7. After carefully reviewing the evidence before it and after utilizing the usual tests to resolve credibility issues, the Board prefers the evidence of Cudmore and Brennan to that of Rasenberg. In the Board's view, Cudmore and Brennan gave their evidence in an honest and straightforward manner. Shortly after their conversation with Rasenberg, they made notes of the discussion and the contents of the notes are consistent with their evidence. The Board accepts as true the evidence of Cudmore and Brennan that Rasenberg did not advise them to put in an appli-

cation or resume. Both men had been out of work for some time and our conclusion from the evidence is that they would have pursued employment with J.M.R. if such a request had been made. The Board finds that Rasenberg did advise Cudmore and Brennan that J.M.R. would not hire any unionized sheet metal workers. This conduct on the part of J.M.R. constitutes a contravention of section 66 of the Act. The breach arises as a result of J.M.R.'s refusal to permit Cudmore and Brennan to participate in the hiring process because these two individuals were members of Local 473.

8. The parties' submissions concentrated on which version of events should be accepted. Very little time was devoted to the issue of the appropriate remedy. Local 473 did request an order directing J.M.R. to offer employment to the grievors, damages, and the usual posting order. Having determined that J.M.R. has contravened the Act, and where the issue of remedy is somewhat novel, the Board has determined that the appropriate course is to remit the matter of remedy back to the parties for resolution. It is hoped that the parties would be able to resolve the remedy issue between themselves now that it has been determined that J.M.R. contravened the Act. The Board hereby appoints a Labour Relations Officer in order to assist the parties with the resolution of the remedy issue.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; August 26, 1991

1. I dissent.

2. I am not persuaded by the evidence of Cudmore or Brenner that J.M.R. Electric did not hire them for the vacant positions of sheetmetal workers because of their association with a trade union.

3. I am satisfied that the evidence given by Rasenberg with respect to the filling of the sheet metal classification vacancies within his company was achieved in a manner that did not in any way contravene section 66 of the Act.

4. The evidence of Cudmore and Brenner is so similar in nature, i.e. - The timing of their telephone calls to Rasenberg - What transpired in respect to their calls - What they allege in respect to their treatment by Rasenberg - The reporting of the alleged incidents to the Union. The whole substance of their testimony suggest this incident was prefabricated for self-serving interests.

5. I would dismiss this application.

2669-90-G; 3121-90-JD Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 30, Applicants v. **J.R. Mechanical Inc.**, Respondent; J.R. Mechanical Inc., Complainant v. Sheet Metal Workers' International Association, Local 30 -and- United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Respondents v. Ontario Sheet Metal and Air Handling Group, Intervener

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Settlement - Employer filing jurisdictional dispute complaint as defence to grievance filed by Sheet metal workers union - Employer and Sheet metal workers subsequently settling complaint and seeking leave to withdraw grievance and complaint - Plumbers union not a party to the settlement and submitting that Board ought not to permit employer to withdraw the jurisdictional dispute complaint - Board adopting rationale in *E.S. Fox* case and concluding that it ought not inquire further into the complaint - Leave to withdraw granted

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. Trim* and *H. Kobryn*.

APPEARANCES: *David Daniels* and *J. Romano* for the complainant J.R. Mechanical Inc.; *A. M. Minsky*, *G. Ward* and *J. Moffat* for the respondent Sheet Metal Workers' International Association, Local 30; *A. Ahee*, *B. Scott*, *David Clark* and *J. Boyle* for the respondent United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46; *Fred Heerema* and *W. N. Gardner* for the intervener.

DECISION OF THE BOARD; August 2, 1991

1. Board File 3121-90-JD is a jurisdictional dispute complaint filed pursuant to section 91 of the *Labour Relations Act* ("the Act"). Board File 2669-90-G is a referral of a grievance to the Board for arbitration pursuant to section 124 of the Act. It is not disputed that the jurisdictional dispute complaint was filed by the complainant employer J.R. Mechanical Inc. ("the employer") as a defence to the grievance. By decision of a different panel of the Board dated March 1, 1991, the referral of the grievance was adjourned "pending the resolution of the jurisdictional dispute".

2. This panel of the Board conducted a pre-hearing conference in respect of the jurisdictional dispute complaint on April 15, 1991. An interim report of that pre-hearing conference was written and provided to the parties. The pre-hearing conference was scheduled to continue on June 6, 1991.

3. On June 6, 1991 discussions amongst the parties took place throughout the day. Towards the end of the day scheduled the panel was advised that a memorandum of settlement had been entered into between the employer and the Ontario Sheet Metal Workers' Conference ("the Conference") and Sheet Metal Workers' International Association, Local 30 ("Local 30"). As a result of that memorandum, the Conference and Local 30 sought leave of the Board to withdraw the referral of the grievance in Board File 2669-90-G. The employer sought leave of the Board to withdraw the jurisdictional dispute complaint filed in Board File 3121-90-JD.

4. The United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 ("Local 46") was not a signatory to the memorandum of settlement. Counsel for Local 46 urged this panel not to permit the employer to withdraw the jurisdictional dispute complaint which it had filed. Counsel for Local 46 strenuously

objected to a termination of the jurisdictional dispute complaint proceedings and argued that the complaint should proceed to an ultimate adjudication upon its merits. Counsel made some preliminary submissions asserting that the Conference and Local 30 were “sector shopping” and/or “Board area” shopping and indicated that if the complaint was permitted to be withdrawn Local 46 would seek costs.

5. Given the lateness of the hour and the desire of Local 30 and the Conference to formally respond to Local 46’s position it was agreed that the parties would each be provided with an opportunity to make written submissions to the Board as to whether the Board should grant leave to withdraw the jurisdictional dispute complaint. The parties agreed that this panel of the Board should consider those submissions and render a decision in this matter.

6. The Board subsequently received the written submissions of the parties.

7. In its submissions to the Board Local 46 continued to assert its position that the Board should refuse to grant leave to the complainant employer to withdraw its complaint. Local 46 submitted that the Board had the jurisdiction and should exercise its discretion to compel the complainant employer to proceed with the adjudication and ultimate determination of the jurisdictional dispute complaint. In the alternative Local 46 submitted that the Board should dismiss the complaint and in so doing note Local 46’s continued claim to the work in dispute and order costs payable by Local 30 and the Conference to Local 46.

8. Local 30 and the Conference in their written submissions did “not object to the Board’s continuing to process the instant jurisdictional dispute complaint on condition that Local 46 be required to take carriage of same...” Such procedure “appropriately accommodates the employer’s desire to withdraw the complaint while, at the same time, permitting the complaint to proceed as Local 46 requests.” Local 30 and the Conference adopted this position “in view of the need to resolve the ongoing jurisdictional disputes between the Conference and its Local Unions with Local unions of the Plumbers.” Reference was made to a number of other jurisdictional dispute complaints involving similar work which have been filed with the Board. Local 30 and the Conference also made submissions regarding Local 46’s claim for costs.

9. The Intervener, Ontario Sheet Metal and Air Handling Group also referred to a number of jurisdictional dispute complaints which have been filed concerning the disputed work and submitted that “In view of the need for an early resolution to the complaints which have been filed to date and others which may be forthcoming, the Intervener concurs with the proposal made [by Local 30] for the continuance of this proceeding.

10. The employer reiterated its request for leave of the Board to withdraw and took no position otherwise in respect of the submissions of either respondents.

11. Although Local 46 in its submissions relied upon the decision of the Board in *Steen Contractors Limited*, [1986] OLRB Rep. May 677. We do not view that decision as applicable to the facts before us. The facts in *Steen Contractors Limited* were extraordinary and readily distinguishable from those before us. Unlike the situation in *Steen Contractors Limited* no interim order has been made pursuant to section 91(8) in the jurisdictional dispute complaint before us. In addition, the work in dispute in *Steen Contractors Limited* had been and remained “a source of conflict between the two trade unions in the Oshawa area”. Unlike the present situation, in *Steen Contractors Limited* that source of conflict was not a “general” source of conflict between two trade unions about competing claims over certain types of work, but concerned ongoing work which had been the subject of an earlier jurisdictional dispute complaint which had not been adjudicated for reasons referred to in the decision. The work in dispute in *Steen Contracting Limited* was ongoing

work which had been let by the same general contractor, was being done for the same client on the same property and involved the same two unions as the earlier jurisdictional dispute complaint. That is not the case before us.

12. We view the decision of the Board in *E. S. Fox Limited*, [1990] OLRB Rep. May 504 to be more closely analogous to the case before us. There the Board exercised its discretion to not inquire further into a jurisdictional dispute complaint after the withdrawal of a grievance which had led to the filing of the complaint. The Board stated *inter alia* at paragraph 18:

In this complaint, the demand that the assignment that the work described in paragraph 4 above be changed came in the form of the grievance which has since been withdrawn. Accordingly, there is no longer any trade union which is requiring that that work assignment be changed.

13. In this instance Local 46 asserts that notwithstanding the withdrawal of the grievance by Local 30 and the Conference a claim or demand for the work in dispute remains outstanding. In its reply to the complaint Local 46 seeks *inter alia* “a declaration that the work in dispute was improperly assigned” and a “declaration that the work in dispute is to be assigned in the future to the United Association on all projects of J.R. Mechanical”. Local 46 asserts that its reply constitutes a demand for the work. As its claim remains outstanding the jurisdictional dispute complaint proceedings ought not to be terminated.

14. For purposes of this decision we are prepared to accept that the reply of Local 46 constitutes a demand for the work. We agree that the Board has the jurisdiction to inquire into this complaint in these circumstances. The exercise of our jurisdiction however is discretionary. In our view, although we have the jurisdiction to do so, this is not an appropriate case for the Board to exercise its discretion and inquire further into this complaint.

15. We agree with and adopt the rationale of the Board in *E. S. Fox Limited, supra*, particularly the Board’s comments in paragraphs 13 to 20 of that decision. The conflict which gave rise to the filing of this jurisdictional complaint was the grievance. The parties to that grievance have resolved their conflict. Local 46 did not file a grievance and has not sought any damages. There is therefore no continuing conflict underlying this complaint which *necessitates* the adjudication of the work assignment. In practical terms there is only a claim for declaratory relief by Local 46 that the work falls within its trade jurisdiction and should be assigned to it.

16. Although the Board does not normally award damages in the adjudication of a jurisdictional dispute complaint, generally the adjudication of a section 91 complaint is made necessary because one or more of the parties has filed a grievance and claimed damages. The grievance and the claim for damages cannot be determined until a decision with respect to the assignment of the work has been made.

17. In the absence of this underlying conflict between the contractor who assigned the work and a trade union we do not consider it appropriate or necessary to make declaratory orders regarding the trade jurisdictions of trade unions via the mechanism of a section 91 complaint. To hold otherwise would invite trade unions to file a section 91 complaint where the only reason for so doing is to obtain a declaration that work falls within its trade jurisdiction and should be assigned to it. The Board is an adjudicative body whose functions include, *inter alia*, the determination of conflicts or disputes. The Board is not an advisory body which should make declarations or determinations about work assignments or the work jurisdictions of trade unions in the abstract or in the absence of a concrete conflict or dispute which requires such determination.

18. We hereby grant leave to the complainant to withdraw its complaint in Board File

3121-90-JD. The referral of the grievance in Board File 2669-90-G is also withdrawn with leave of the Board.

0970-91-R United Food and Commercial Workers International Union, Local 175, Applicant v. **Ridge Landfill Corporation**, Respondent v. Group of Employees, Objectors

Certification - Form 6 posted for 2½ days before expiry of terminal date - Whether posting period of 2½ days inadequate - Board denying objecting employee's request for extension of terminal date - Certificate issuing

BEFORE: *Nimal V. Dissanayake*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *Ian Anderson* and *Mary Duchesne* for the applicant; *R. A. Werry* and *M. Kozlof* for the respondent; *Greg Templeton* for objectors.

DECISION OF THE BOARD; August 30, 1991

1. The name "Ridge Landfill Corp. Ltd." appearing in the style of cause in this application is amended to read: "Ridge Landfill Corporation".
2. This is an application for certification. On July 18, 1991, the parties met with a Labour Relations Officer and agreed upon a unit of employees appropriate for collective bargaining. It was determined that more than 55% of the employees in that unit were members of the applicant on the terminal date, July 5, 1991, fixed pursuant to sections 7 and 103(2)(j) of the *Labour Relations Act*. There was also before the Board a timely petition signed by two employees who objected to the certification of the applicant. However, that had no bearing on the applicant's entitlement to a certificate.
3. In other words, notwithstanding the petition, the applicant was entitled to be certified without the need for a representation vote under section 7. However, the two employees who had filed the petition, claimed that "the green sheet" (Form 6 - the Notice To Employees Of Application For Certification) - had not been posted for an adequate period and in effect sought an extension of the terminal date. As the parties were unable to resolve this posting issue, they appeared before the Board for a determination.
4. The Board's records indicate that the document package, including the "green sheets", were mailed to the respondent by the Board on June 26, 1991. The terminal date was fixed at July 5, 1991. Because of the intervention of a long weekend holiday, the respondent did not receive the material until the afternoon of Tuesday, July 2, 1991. The respondent posted the green sheet at approximately 1:30 p.m. on July 3, 1991. Two copies of the green sheet were posted, one in the lunchroom and another in the vicinity of the time clock.
5. Mr. Greg Templeton, one of the two employees who had signed the petition appeared on behalf of the objecting employees. He claims that since he did not work in the main area where the notices were posted, he did not see the notices until approximately 10:00 a.m. on July 4, 1991. He and the second employee signed a petition opposing the application. They felt that the other

employees who were supporting the application had been “misled”. They talked to several employees about that but, as Mr. Templeton put it “the other employees didn’t fully understand our petition and we couldn’t explain it properly”.

6. Mr. Templeton was under the belief that the petition had to be received by the Board by July 5, 1991, the terminal date. Therefore, he sent the petition containing the two signatures to the Board on the same day July 4, by Registered mail. Mr. Templeton points out that since he saw the notice on the 4th of July at 10:00 a.m. and had to mail it by 5:00 p.m. the same day, he only had 6 or 7 hours to circulate a petition. He submits that that is totally inadequate.

7. The green sheet or From 6 notice in this case contains the following paragraphs:

3. The Board has fixed Friday, the 5th day of July 1991 as the terminal date for this application.

• • •

4(2) A document referred to in subsection (1), ...

(b) must be,

(i) received by the terminal date if sent other than by registered mail, or

(ii) mailed to the Board by the terminal date shown in paragraph 3 if sent by registered mail.

8. Despite Mr. Templeton’s belief that he had only 6 or 7 hours of notice, it is clear that the green sheets were posted for approximately 2 1/2 days before the expiry of the terminal date. Because Mr. Templeton worked in another area of the employer’s premises he had actual notice of only about 1 1/2 days. However, the Board does not extend the terminal date on the basis of individual employees’ personal circumstances, if it was otherwise satisfied that there had been adequate posting. The fact that a particular employee had not been scheduled to work, had been away sick or on holidays, during the period of posting has not caused the Board to extend the terminal date. (*MacDonell Memorial Hospital*, [1979] OLRB Rep. Oct. 996).

9. Accordingly, what the Board must determine here is whether in the particular circumstances of this case, the posting period of 2 1/2 days was inadequate so as to cause it to exercise its discretion under section 82 (2) of the Rules to extend the terminal date.

10. The Board has stated that “when it considers a request for an extension of the terminal date the Board must concern itself with balancing the interest of all employees who are entitled to have fair and adequate notice of the proceedings and the interest of the applicant and the employees who have chosen to be represented by the applicant to have the application disposed of without any undue or prejudicial delay”. *Kilean Lodge Incorporated*, [1977] OLRB Rep. April 240 at 243.

11. Counsel for the respondent relied heavily on the fact that here the request for extension of the terminal date came, not from the employer but from Mr. Templeton, an employee in the bargaining unit. It is true that in *Kilean Lodge*, *supra*, the Board stated that one of the things it takes into account is “whether the request for an extension is made by the employer alone or by a group of employees”. That makes a lot of sense because if it is the employer alone that makes the request, the indication is that the employees themselves had not been adversely affected by the length of the period of posting. However, the converse is not true that if the request comes from an

employee, it necessarily means that the posting has been inadequate. In order to determine the adequacy of the posting all of the circumstances must be examined.

12. The bargaining unit covered by the application is relatively small consisting of 10 employees. The evidence is that all of the employees except Mr. Templeton work in one location. It is a one shift operation, although one employee works late. The notices were up for 2 1/2 days prior to the expiration of the terminal date. One copy was posted in the lunchroom and another near the time clock.

13. There is no suggestion that there was any employee who did not see the green sheet in sufficient time to be able to file an objection. It is interesting to note that Mr. Templeton was the most disadvantaged of the employees, because he was the only employee who worked in a different area. Yet he read the notice more than 1 1/2 days in advance of the expiry of the terminal date. He had no difficulty making his objection to the application in a timely fashion. He admitted that he also talked to several employees about joining him in objecting to the certification application but was unable to convince anyone. Therefore he was left with a petition with just the two signatures.

14. We consider it significant that no employee has made representations to the Board that he or she was adversely affected by the period of posting. Even Mr. Templeton did not suggest that he was aware of some employee who wished to object to the application but was unable to do so because of the length of the posting.

15. The hearing before the Board took place some 20 days after the expiry of the terminal date. Yet none of the bargaining unit employees appeared before the Board to claim that they were disadvantaged by lack of notice. The only employee who did appear, Mr. Templeton was able to make his objection in a timely manner. Considering that Mr. Templeton probably had the shortest period of notice because of his work location, the fact that he, together with the other employee, was able to file timely objections is a *prima facie* indication that the other employees were afforded sufficient time to respond to the notice if they so desired.

16. In these circumstances we see no reason to subject this application and the rights of the affected employees to any further delay. The request for an extension of the terminal date is denied.

17. we have already noted, the petition containing two signatures, if voluntary, could not cast doubt upon the entitlement of the applicant to certification without the need for a representation. Accordingly, the Board did not enter upon an inquiry into the voluntariness of that petition.

18. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

19. Having regard to the agreement of the parties, the Board finds that all employees of the respondent working at the landfill site in the Township of Harwich, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of June 18, 1991, constitute a unit of employees of the respondent appropriate for collective bargaining.

20. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 5, 1991, the terminal date fixed for this application

and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. A certificate will issue to the applicant.

0978-91-R Ontario Nurses' Association, Applicant v. **Shelburne Residence**, Respondent v. Service Employees International Union, Local 204 (affiliated with the A.F. of L., C.I.O., C.L.C.), Intervener

Bargaining Unit - Certification - Evidence - Nurses' union making displacement application and seeking to carve out its standard nurses unit from existing all-employee bargaining unit - Board finding no extenuating factors which would cause it to depart from the usual practice in displacement applications - Board declining to hear evidence of external comparisons of wages and benefits - Bargaining unit applied for held not an appropriate unit - Application dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *Christopher Dassios* and *Dan Anderson* for the applicant; *Derrick Hoare* and *Lynda Coulter* for the respondent; *Mark Lewis* for the intervener.

DECISION OF THE BOARD; August 12, 1991

1. This is an application for certification which came on for hearing before this panel of the Board on Friday, August 2, 1991. The Board heard and considered the evidence and submissions of the parties at that time. At the conclusion of the submissions the Board rendered the following oral ruling. In so ruling the Board considered the decisions of the Board in *The Ottawa Citizen, a Division of Southam Press Limited*, [1969] OLRB Rep. March 1281; *University of Guelph*, [1975] OLRB Rep. April 327; *Porcupine General Hospital*, [1987] OLRB Rep. Feb. 423; *Villa Centres Management Ltd.*, [1979] OLRB Rep. April 359 and *The Municipality of Metropolitan Toronto*, [1987] OLRB Rep. Feb. 278.

This is an application for certification in which the applicant Ontario Nurses Association ("ONA") seeks to be certified for what may be termed as its standard bargaining unit namely registered and graduate nurses employed in a nursing capacity by the respondent. The intervener Service Employees International Union Local 204 is the incumbent union which currently represents the employees whom the ONA seeks to represent, together with a number of other employees in what can be referred to as an "all employee" bargaining unit.

The only issue before the Board is whether the applicant ONA can, in effect, carve out its standard bargaining unit from the existing bargaining unit.

We have considered the evidence and the submissions of the parties. It is clear that section 6(3) of the Act gives the Board a discretion whether to permit a carve out of a craft or craft like unit where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application was made.

Notwithstanding the well-reasoned submissions to the contrary from counsel for the ONA, we are not prepared to exercise our discretion in favour of the ONA's request to carve out its traditional or standard unit.

We do not view the relatively short period of time which the SEIU Local 204 has represented this unit, nor the fact that over that period of time the nurses have "lost" some ground in maintaining a wage differential between themselves and employees in less skilled classifications to be persuasive given the absence of any evidence that the incumbent union has failed to adequately represent the employees within the all employee unit together with the fact that the collective agreement discloses that the SEIU Local 204 has over that same period of time obtained a forty-eight percent pay (48%) increase for the nurses.

There are no other extenuating factors which would cause this panel to depart from the Board's usual practice in displacement applications. In the result, in the circumstances of this case we find that the bargaining unit applied for is not an appropriate unit and dismiss this application.

2. We note that earlier in these proceedings we had made the following evidentiary ruling:

For the reasons enunciated in the decisions of the Board in *The University of Guelph*, [1975] OLRB Rep. April 327 and *The Ottawa Citizen*, [1969] OLRB Rep. March 1281 we view the evidence of external comparisons of wages and benefits to the wages and benefits of the nurses in this unit not to be relevant to our determination in this matter. We therefore grant the intervenor's motion not to admit this irrelevant evidence.

0407-91-U David A. Spackman, Complainant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 222, Respondents

Duty of Fair Representation - Practice and Procedure - Remedies - Unfair Labour Practice - Union settling grievance rather than pursuing matter to arbitration - Complainant not given promised opportunity to make representations to union's executive board - Union neither appearing at Board hearing, nor filing reply to complaint - Employer not named in complaint and taking no part in proceeding - In absence of explanation from union, Board finding *prima facie* case of breach of fair representation duty made out - Complaint upheld - No entitlement to financial compensation established - Union directed to provide detailed written explanation for settling complainant's grievance

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *David A. Spackman* appearing on his own behalf; no one appearing on behalf of the respondent unions.

DECISION OF THE BOARD; August 8, 1991

I

1. This is a complaint under section 89 of the *Labour Relations Act*. The complainant, David Spackman, contends that the respondents (hereinafter referred to simply as "the CAW") contravened section 68 of the Act when the CAW settled a grievance rather than pursuing the matter to a hearing before an arbitrator. Section 68 reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in

bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. This complaint was filed on May 7, 1991. By letter dated May 10, 1991 the Board provided the CAW with a copy of the complaint, and notified the CAW that a Labour Relations Officer had been appointed to endeavour to effect a settlement. This material was sent to the CAW's offices at 205 Placer Court in North York. The letter further advises the CAW that if a meeting with the Officer does not result in a settlement, the Board will schedule the case for hearing.

3. An Officer contacted the parties to explore the possibility of settlement. No settlement was achieved. A notice of hearing in Form 8 was sent to the complainant and to the CAW. The notice indicated that a hearing would take place at the Board's premises in Toronto on Monday, July 29, 1991 and would continue, if necessary, on Tuesday, August 20, 1991.

4. Under the Board's Rules, a person against whom a complaint has been made is expected to file its Reply, if any, within six days of receiving it. The CAW has not filed a Reply or any other statement contesting or explaining the assertions made by Mr. Spackman in his complaint. Nor did the CAW appear at the hearing. Accordingly, Mr. Spackman's evidence (given under oath) is uncontradicted.

5. The complainant's employer, the A.G. Simpson Company Limited, has not been named in this complaint as either a party respondent or an "interested party". The company has had no notice of this complaint or of the hearing, and has taken no part in the proceeding.

6. With this background, then, I turn to the facts.

II

7. The complainant has been an employee of the A.G. Simpson Company for approximately five years. The CAW is his present bargaining agent. I say "present bargaining agent", because the CAW's right to represent the employees of A.G. Simpson is of relatively recent origin, dating from a Board certificate issued on July 26, 1989.

8. Prior to 1989 the employees of A.G. Simpson were represented by a union known as the "Simpson Plant Council". In 1989 the CAW sought to displace the Simpson Plant Council and applied for certification as the employees' bargaining agent. A representation vote was held, and the CAW won.

9. During the campaign preceding the representation vote, the CAW maintained that it would be a more effective bargaining agent than the Plant Council, could provide better service, and would, if selected, "take over" any employee grievances against the company which were then being processed by the Plant Council.

10. Pursuant to section 56 of the *Labour Relations Act*, when the CAW was certified as the employees' bargaining agent in July 1989, the Plant Council immediately ceased to represent the employees in the bargaining unit and the collective agreement between the company and the Plant Council ceased to operate. The complainant testified that the Plant Council subsequently dissolved, and dispersed its funds to its members. So far as I can determine on the evidence before me, the Plant Council no longer exists.

11. I do not have before me either the Plant Council agreement which was in place from 1986 to 1989, or the existing collective agreement between the CAW and the A.G. Simpson Company. Accordingly, I am unable to reliably say anything about the terms of either agreement or

determine how, if at all, the terms of those agreements might apply to the complainant's situation. What can be said is this: the CAW was not a party to the 1986-1989 Plant Council agreement, that agreement ceased to exist upon the CAW's certification, and the Plant Council, which was a party to the old agreement, no longer exists either. It remains unclear how the CAW proposed to arbitrate grievances arising under a collective agreement to which it was not a party and which ceased to exist upon the CAW's acquisition of bargaining rights.

12. In May 1989 the complainant volunteered to work overtime for the four-day long week-end beginning May 19, 1989 and ending May 22, 1989. Shortly after the commencement of his Friday shift, the complainant was involved in a dispute with his supervisor. As a result, he was suspended "indefinitely" and sent home. The company only intended the suspension to last for the weekend but, when it tried to call the grievor to work the following week, it was unable to contact him.

13. On May 31, 1989 the complainant filed a grievance asserting that his suspension was unjust, and demanding the equivalent of thirteen and a half days' pay (reflecting the premium rates payable for working overtime on a holiday weekend). The grievance was not settled by the Plant Council (then the complainant's bargaining agent), so the matter was scheduled to proceed to arbitration. The reference to arbitration was made by Doug Doyle, who was an official of the Plant Council and subsequently became a local official of the CAW. It was the complainant's understanding that the CAW would represent him in respect of this grievance and would assume any costs associated with the arbitration.

14. In May 1990 Doug Doyle (now on behalf of the CAW), and the company entered into a settlement of the complainant's grievance. In accordance with that settlement, the company agreed to pay the complainant for four days at straight time and to clear his record of the alleged infraction. The complainant is not satisfied with this settlement because, in his view, it does not take into account the premium pay that he would have earned, and thus does not fully compensate him for the monies lost. The complainant demanded that his grievance be reinstated and taken to arbitration.

15. The complainant testified that there was an "understanding" by which grievances against the company that had purportedly been settled could be "revived" by a process of internal review or appeal within the union. Since I do not have before me either the Plant Council agreement, the CAW agreement, the CAW Constitution, or any related letters of understanding, I am unable to assess the legal basis for the "understanding" to which the complainant refers, or determine how that understanding may bind the company and nullify a written settlement, which, by its terms, is said to be a "full and complete settlement of the grievance". Nor am I able to say how this "understanding" may relate to grievances which arose prior to the CAW's acquisition of bargaining rights under a collective agreement to which the CAW was not a party. I will return to these difficulties later.

16. The complainant raised his concerns with Len Ruel, a national representative of the CAW. Mr. Ruel assured him that his grievance would be reinstated and taken to arbitration if his unit voted to support that course of action. Mr. Ruel further assured the complainant that, in any event, he would have the opportunity to make representations to the union group which ultimately determined whether or not his case would proceed to arbitration. The complainant has been critical of Mr. Doyle's leadership and was concerned that personal antipathy might inhibit an objective assessment of his case.

17. According to the complainant, his request to reinstate the grievance was put before the A.G. Simpson group in late June 1990. The membership voted unanimously to have the matter

revived and referred to arbitration. But that is not what happened. Instead, a little over two months later, Mr. Ruel told the complainant that the matter was being referred to the CAW National Executive Board. This was the last that the complainant heard of it until January 28, 1991 when he was informed that the case would remain closed.

18. The complainant was not given the promised opportunity to make representations, and efforts to obtain an explanation from the Executive Board were unsuccessful both before and after the filing of this complaint. The complainant was told that the union officials concerned were too busy to speak to him. The complainant indicated to the Board that he was less concerned about the precise terms of settlement than the fact that Mr. Ruel failed to fulfil his promises and undertakings, and the CAW was totally unresponsive. In the complainant's submission, the CAW's conduct has been arbitrary, and unfair, and its failure to respond to the complaint is indicative of the way he has been treated all along.

III

19. There is no real dispute about the legal principles which must be applied in this case. In processing employee grievances, a trade union is obliged to act in a manner that is neither arbitrary, discriminatory or in bad faith; but this does not mean that the union must take every case to arbitration simply because an aggrieved worker demands "his day in court". A trade union is entitled to settle grievances, and in many cases it should do so to avoid the expense and uncertainty of litigation. In *Catherine Syme* [1983] OLRB Rep. May 775, the Board had this to say:

20. Section 68 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any particular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinantly [sic] adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process

could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence of one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

The fact that a union has settled a grievance over an employee's objection does not establish a breach of section 68, even if it appears to the Board that the employee might have had an arguable case had the matter proceeded before an arbitrator. The likelihood of success is an important factor that a union must consider, but it is not the only one.

20. The problem in this case, however, is that I am unable to reliably determine either the strength of the complainant's case, or the reason why the union acted the way it did. Obviously, the settlement is not unreasonable on its face, since it awards the complainant four days' pay and totally erases the incident from his disciplinary record. This latter feature would not have been obtained unless the grievor were completely successful in his position: that is, that there was no misconduct *at all* on his part and no basis *at all* for any disciplinary response from the company. But I am unable to say what considerations the union took into account when it decided to settle the case, or why Mr. Ruel apparently reneged on the undertakings that he made to the complainant: that the case would go to arbitration if the unit voted in favour, and that the complainant would have an opportunity to make his case to the ultimate decision-maker.

21. The complainant points out that in the letter he received from the President of the CAW, it is said that "the National Executive Board had no evidence that your grievance was improperly handled"; but the complainant was never asked to address that question, he has no idea what "evidence" the Executive Board had before it, and to the extent that "improper handling" is the relevant test, the union acted upon the submissions of the union officials "doing the handling", to the exclusion of the individual whose case was being dealt with. The complainant asks parenthetically: how could the CAW conclude that there was "no evidence" that my case was improperly handled, when they didn't ask me for my evidence as to how it was handled? And, of course, the adherence or otherwise of the union to this internal review process does not, in itself, determine whether the *initial settlement* was properly concluded. If that settlement was arbitrary or motivated by malice or other improper considerations, the internal review is irrelevant unless it "cured" the earlier defect.

22. In all of these circumstances, and in the absence of any explanation from the union as to what it acted upon, or why, I must find that the complainant has established a *prima facie* case of a breach of section 68, and that his case has not been answered by the respondent union. The Board therefore declares that the respondent CAW and its Local 222 have contravened section 68 of the Act.

23. But what is the appropriate remedy beyond a declaration?

24. The complainant has not named A.G. Simpson as a party. I do not think that I either can or should direct a remedy that adversely impacts upon a party about which no complaint is made and which has had no notice of this proceeding. Nor can I ignore the practical or legal diffi-

culties which may flow from the resurrection of a grievance arising under a prior collective agreement with a trade union that no longer exists, touching on events more than two years ago.

25. What the complainant may have lost here is, at most, the possibility or opportunity to have his case considered by an arbitrator. If that arbitrator determined that s/he had jurisdiction to hear the case (given the practical and legal difficulties mentioned above) and that there was no basis whatsoever for the complainant's suspension, the arbitrator might be disposed to award some compensation in addition to the four days at straight time that the complainant has already received. But on the basis of the evidence before me, I am totally unable to assign any monetary value to that possibility or to connect the union conduct of which Mr. Spackman complains to any proven or even reasonably arguable financial loss. Thus, while I can conclude that the union has contravened section 68, I do not think that the complainant has established any entitlement to financial compensation.

26. However, in my view, the complainant is entitled to an explanation from the union about what it acted upon when it ultimately decided not to take his case to arbitration. The Board therefore directs that the CAW provide the complainant with a detailed explanation, in writing, of the reasons why it settled his grievance, and ultimately determined that it would not be reinstated. Such explanation must include a detailed statement of the facts and factors that it took into account in reaching those conclusions.

2438-90-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Toyota Canada Inc., Respondent

Bargaining Unit - Certification - Pre-Hearing Vote - Board, in earlier decision, finding union's proposed unit appropriate and directing that ballots cast by employees in that unit be counted - Employer objecting to counting ballots - Board rejecting employer argument that certain employees who were not employed in the bargaining unit on the application date should have their ballots counted because these employees subsequently came within the bargaining unit - Board directing the counting of the ballots in accordance with its earlier decision

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*

DECISION OF VICE-CHAIR M. A. NAIRN AND BOARD MEMBER C. MCDONALD: August 30, 1991

1. This is an application for certification wherein the applicant requested that a pre-hearing representation vote be taken. That vote was held and the ballot box sealed pending the resolution of certain issues in dispute between the parties. Following a hearing the Board issued a decision dated July 15, 1991 wherein (at paragraph 31) it ordered that the ballots cast by employees in the bargaining unit on the application date were to be counted. The parties met with a Labour Relations Officer for the purpose of counting the ballots. At that time the respondent objected to the counting of the ballots. By decision dated July 30th, 1991 the Board directed the parties to file their submissions with respect to why the ballots should not be counted forthwith.

2. Notwithstanding that the Board's usual practice would be to count the ballots of those employees whose inclusion in the bargaining unit is not in issue in order to determine whether it is

necessary to inquire further, we have reviewed and will deal with the submissions of the parties in this matter.

3. The respondent is of the view that certain employees who were not employed in the bargaining unit on the application date should have their ballots counted because these employees subsequently came within the bargaining unit described in the Board's decision of July 15, 1991. The Board in that decision deals with the question of the description of the appropriate bargaining unit which was the main issue outstanding between the parties and concluded that (essentially) it was to be described as all employees at the Bellamy/Progress location. This excluded from the bargaining unit those employees then employed at a location referred to as Nugget Ave. The respondent now seeks to have the ballots of those employees counted because, as of the date of counting the ballots, they would fall within the bargaining unit (subject to any other exclusion). The respondent asserts that not to count these ballots would be a denial of these employees' rights under section 3 of the *Labour Relations Act*.

4. In dealing with any application for certification the Board is required to determine whether the applicant has the requisite support of the employees in the bargaining unit in order to determine whether it is entitled to be certified. Given that workforces (and consequently the employees who fall within any bargaining unit) continually fluctuate (for a whole host of reasons, for example, new hires, lay-offs or re-calls, or transfers) that determination must be made as of a fixed point in time even though subsequently circumstances may change. The Board's decision of July 15th directs that the ballots of those employees *in* the bargaining unit *on* the application date be counted. We are not persuaded that we ought to modify or vary that decision. Therefore, we direct the counting of the ballots in accordance with paragraph 31 of the Board's decision of July 15, 1991 forthwith.

5. This matter is referred to the Manager of Field Services.

DECISION OF BOARD MEMBER J. A. RONSON; August 30, 1991

1. These are my reasons for dissenting from the decision of my colleagues dated July 15th, 1991, and my comments on the issues that have arisen subsequently.

2. The union originally applied for certification of all the employees of the employer in the City of Scarborough. It withdrew that application when it learned that the employer carried on business at various locations in that City. The union then applied for a pre-hearing vote at one specific address of the employer in Scarborough ("Bellamy/Progress"). Because of the position taken by the employer, all the employees in the City of Scarborough were allowed to vote and the ballots from the various locations were kept segregated.

3. We then heard evidence going to the scope of the bargaining unit. Should it be for one address or for the entire City of Scarborough? We learned that the employer's locations in the City were all involved in the activity of receiving new automobiles and new parts from their original place of manufacture and in delivering these products to sales dealerships and repair sites respectively. We learned that some employees were working away from the Bellamy/Progress site on a temporary basis while construction work was completed at Bellamy/Progress. As soon as construction work was complete they would move to the Bellamy/Progress site.

4. In the circumstances the employer relied on some 40+ years of Board jurisprudence and asked that the scope of the bargaining unit be set as the City of Scarborough. In their lengthy reasons my colleagues told the employer that times have changed and certified the union for the Bellamy/Progress site only. I disagreed on the basis that long established community of interest

practice still made good labour relations sense. What has subsequently occurred shows the wisdom of that practice.

5. When it came time to count the ballots at Bellamy/Progress, the employees temporarily away from the site had returned. Were they now “employees” at the Bellamy/Progress site? Should their ballots be counted or ignored? Given the decision of the majority of 15 July, their wishes with respect to the choice of a bargaining unit are irrelevant. No doubt they may wonder just what meaning the preamble and s.3 of the Labour Relations Act have with respect to their particular situation, but that, too, is irrelevant.

1427-91-R; 1770-91-U United Steelworkers of America, Applicant v. Conix Canada Inc., c.o.b. as Tycos Tool & Die, Respondent v. Group of Employees, Objectors; United Steelworkers of America, Complainant v. Conix Canada Inc. c.o.b. as Tycos Tool & Die, Respondent

Certification - Practice and Procedure - Unfair Labour Practice - Board consolidating union’s application for certification and unfair labour practice complaint - Union counsel estimating ten hearing days could be required to complete the two matters - Board offering twenty-nine dates before the end of January 1992 - Of eighteen dates in 1991 canvassed, parties’ counsel all available on only one - Board setting ten dates in 1991 without regard to achieving consensus among the parties

BEFORE: K. G. O’Neil, Vice-Chair, and Board Members J. A. Rundle and H. Peacock.

APPEARANCES: Paula Turtle and Brando Paris for the applicant/complainant; E. L. Stringer Q.C. for the respondent; C. J. Abbass and Paul Robertson for the objecting employees.

DECISION OF THE BOARD; August 27, 1991

1. The name of the respondent is amended to read: “Conix Canada Inc., c.o.b. as Tycos Tool & Die”.
2. This is an application for certification and a related section 89 complaint. This decision deals with the matter of consolidation of the two proceedings and scheduling matters only.
3. This matter came on for hearing before this panel on August 23, 1991. On August 22, 1991, the applicant filed the section 89 complaint alleging breaches of sections 64, 66 and 70 with a letter indicating its intention to rely on the particulars of the complaint in challenging the voluntariness of a petition opposing the certification of the union filed in this matter.
4. The union sought consolidation of the two proceedings. This was not originally opposed by employer counsel but was opposed by petitioner’s counsel because of the potential cost to his clients. The reason for the union’s request for consolidation was that there would be overlap in the evidence between the section 89 and the matter of the voluntariness of the petition and that the atmosphere created by the alleged breaches of the Act would affect the Board’s finding on the issue of voluntariness of the petition.

5. Petitioners' counsel submitted that the Board should not hear the particulars of the section 89 complaint in regards to the voluntariness of the petition as they were untimely since they could have been raised at the Labour Relations Officer meeting a week earlier, or at sometime between then and the eve of hearing. The union took the position that the section 89 complaint and its particulars were timely. The employer, while reserving its right to ask for an adjournment if necessary, expressed its desire to proceed on the matter, notwithstanding the short notice of the section 89 complaint. Petitioners' counsel indicated he would need an adjournment if he were asked to deal with the particulars of the section 89 complaint that day.

6. The matter of order of proceeding also arose. Employer counsel took the position that the section 89 complaint was not one triggering the reverse onus and therefore the union should go before the employer. The union took the position that the allegations did trigger the reverse onus provisions and therefore the employer should proceed first. Petitioners' counsel supported the position of the employer in this matter.

7. As support for its position that the union should proceed before the employer, employer counsel pointed to allegations in the section 89 complaint in which reference is made to "a bargaining unit employee". Counsel submitted the employer has no knowledge of the identity of that bargaining unit employee. He argued that the union is not required to tell the employer who it is but that the union should then go first. Employer counsel underlined that this was not a discharge and that he strongly disagreed with the suggestion that the employer should go first. In the alternative, he withdrew his concurrence with consolidation of the two matters.

8. Before this panel began to hear evidence, counsel for the applicant requested that the Board consider whether this panel or another panel would be able to hear the matter more expeditiously as she estimated ten days could be required to complete the two matters if consolidated, as the union requested. Employer counsel said he was not in a position to estimate and petitioner's counsel had thought the matter could be dealt with in a day before he was aware of the section 89 complaint. The Registrar provided dates and we canvassed the parties' availability on twenty-nine dates that were available for this panel or another panel between September 6 and the end of January 1992. Of the eighteen dates in 1991 canvassed, the parties' counsel were all available on only one, November 1.

9. On learning that there was only one date in 1991 on which the parties could agree, union counsel asked that seven dates be set peremptorily and said that the union was prepared to make adjustments to accommodate that. Both employer and petitioners' counsel opposed this request. Employer counsel submitted that peremptory dates only made it difficult for everyone and would likely not save more than a month or two at best. Counsel for the employer also submitted that a party should be able to be represented by the counsel of choice, within reason, and said that the matter was a balancing of interests. He asked that if we set peremptory dates that they be set on the dates that he was available. The union responded that although it realized that peremptory dates were inconvenient, the union would be the only party prejudiced by starting the case months from now and not having any prospect of finishing it before well into the new year. She argued that this factor must outweigh counsel's convenience. The union asked that they be set without consideration of convenience of counsel for any party.

10. Petitioners' counsel submitted that it was too costly for any counsel to tie up that many dates. He submitted that the Board should have an eye to the practicality of the matter and not set the number of dates requested by union counsel. He referred to the fact that his client was not in a position to charge union dues and had to take time off work to attend these proceedings. He submitted that these days petitioners need legal advice and they would not be able to afford it if the

Board set that many dates for hearing. He questioned the union's practicality in bringing the allegations in the section 89 complaint.

11. Having considered all parties' submissions, the Board ordered the matters consolidated as it seemed that the evidence would be overlapping between the certification application and the section 89 complaint to the extent that it would be impractical to hear them separately.

12. After considering the submissions of the parties, the Board set ten dates without regard to achieving consensus among the parties. We set ten in the hope that the outside estimate would ensure that the matter was finished within the year as this is a certification matter which ought to be dealt with as expeditiously as possible. Setting a smaller number might only mean an unfinished case and the setting of even later continuation dates. Another panel of the Board was available on sixteen dates before the end of the year. This panel was only available on four before the end of the year, and none before November 4. Given this situation, and in light of the unpreparedness of at least one party to deal with the particulars in the section 89 complaint, as well as the fact that the morning had been consumed with the above-noted matters, it seemed advisable to adjourn the matter to be heard by another panel. In choosing the ten dates to be set, we did not avoid the eight of the new panel's dates that employer counsel was available as we would have been unable to do so and set the necessary ten dates to allow the matter to be finished by the end of this calendar year. There was also no reason to do so given the union's acknowledgement that it would have to make other arrangements to accommodate its own request. Employer counsel was also available for more of the dates canvassed than the other two parties. To reach ten, we set two additional dates, those employer counsel thought would be the least difficult to accommodate.

13. Mr. Abbass asked whether he could make submissions to the new panel on two of the dates set that are very inconvenient for him. We advised that the purpose in setting the dates without regard to the parties' consensus was that the hearing would proceed but that we did not purport to bind the new panel.

14. We left the matter of the order of proceedings and any other preliminary matters to the new panel to hear. On request of counsel we also set another date for the new panel to deal with preliminary matters. Representations on any preliminary matters may be made to that panel on September 6 at 9:30 a.m. so that guidance may be given before the start of the evidence on October 18. The matter is scheduled to proceed on the following dates: September 6 (for preliminary matters only), October 18, 24, 25, November 1, 12, 28, 29, December 9, 19 and 20.

0559-91-U Energy and Chemical Workers Union, Complainant v. United Food and Commercial Workers International Union, Locals 175/633, Respondent v. John Clark, Grievor

Practice and Procedure - Unfair Labour Practice - Grievor asking that his name be substituted for that of union as complainant in unfair labour practice complaint - Complainant union not present or represented at hearing - Employer objecting to substitution - Board denying grievor's request - In absence of complainant to prosecute complaint, Board dismissing complaint

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *J. A. Ronson* and *E. G. Theobald*.

APPEARANCES: No one appeared for the applicant; *Jim Crockett* and *Bud Adam* for the respondent; *John Clark* for the grievor.

DECISION OF THE BOARD; July 29, 1991

1. This application was made under section 89 of the *Labour Relations Act* alleging that the respondent had dealt with grievor John Clark contrary to the provisions of sections 66(a) and (c), 70, 79(2) and 80 of the Act. It was scheduled to be heard by the Board on July 29, 1991. Prior to that date, the grievor wrote to the Board and asked that his name be substituted for that of the United Energy and Chemical Workers Union as the complainant.

2. At 9:30 a.m. on Monday, July 29, 1991, the time and date set for the hearing, the complainant was not present or represented. That was still the situation when the Board convened the hearing at 10:35 a.m. Mr. Clark reiterated the request which he had expressed in writing before the hearing. The respondent objected to the substitution. Absent consent for the substitution of John Clark as complainant the Board denied the grievor's request to be substituted for the Energy and Chemical Workers as the complainant.

3. Furthermore, in the absence of the complainant to prosecute its complaint, the Board dismissed the complaint.

1319-91-R; 1320-91-R United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, Applicant v. Waylok Air Conditioning Limited, Respondent; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 599, Applicant v. Waylok Air Conditioning Limited, Respondent

Certification - Construction Industry - Evidence - Membership Evidence - Certification applications in ICI sector made in name of union's local 463 and local 599 - In support of applications, applicants submitting membership evidence, including evidence of membership in union's local 46 - Evidence of membership in local 46 held not evidence of membership in either local 463 or local 599 - Applications dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *D. A. MacDonald* and *E. G. Theobald*.

DECISION OF THE BOARD; August 8, 1991

1. These two applications for certification were made pursuant to the construction industry provisions of the *Labour Relations Act* ("the Act").

2. The applicant in Board File 1319-91-R ("U.A. Local 463") seeks to be certified for what may be termed as its standard craft unit in the industrial, commercial and institutional ("ICI") sector of the construction industry in the province of Ontario and in all other sectors of the construction industry in Board areas 9, 10, 11 and 12.

3. The applicant in Board File 1320-91-R ("U.A. Local 599") seeks to be certified for its standard craft unit in the ICI sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Board area 18.

4. The applicants filed with the Board two (2) combination applications for membership and receipts with respect to membership in U.A. Local 599 and two (2) combination applications for membership and receipts with respect to membership in U.A. Local 463. These combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six month period immediately preceding the terminal date of the applications. In addition, the applicants filed one (1) photocopy of an application for membership dated April 14, 1967 together with a "certificate" from the secretary-treasurer of U.A. Local 46 which states the person named in the photocopied application is a member in good standing of U.A. Local 46 and has paid monthly dues for at least one month within the six-month period immediately preceding the terminal dates of the applications.

5. In addition, the applicants filed two (2) duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry. The Form 80 in Board File 1319-91-R is signed by the Business Manager of U.A. Local 463 and specifies that there were seven persons who were employees of the respondent in the bargaining unit U.A. Local 463 claims to be appropriate for collective bargaining on the date of the making of its application.

6. The Form 80 in Board File 1320-91-R is signed by the Business Manager of U.A. Local 599 and also specifies that there were seven persons who were employees of the respondent in the bargaining unit which Local 599 claims to be appropriate for collective bargaining on the date of the making of its application.

7. Both applications were made on the same date.

8. In a letter accompanying the membership evidence and Form 80 declarations counsel for the applicants states that:

"Much of the enclosed membership evidence is relevant to both of the above-mentioned files, and we therefore request that all of the membership evidence enclosed by [sic] applied by the Board to each such file."

9. Counsel's letter goes on to detail that the photocopied membership evidence relates to a person employed in the ICI sector, the membership evidence with respect to membership in U.A. Local 463 relates to persons employed in the ICI sector and the membership evidence with respect to membership in U.A. Local 599 relates to persons employed in the residential sector in Board area 18. Counsel states:

“Therefore, subject to any rulings by the Board to the contrary, the membership evidence.... which relate[s] to the ICI sector, is relevant in both files.

The membership evidence ... [which] relate[s] to the residential sector ... would be relevant in File 1320-91-R (U.A. Local 599). However, this membership together with the other membership, has been submitted to the Board in both files in an attempt to ensure maximum flexibility in the application of membership evidence in both applications.

In the result it would appear that either Local 463 or Local 599, or both such locals, would have membership evidence for three persons in the ICI sector, and Local 599 would have membership evidence for two persons in a sector other than the ICI sector. If sufficient for certification this evidence would permit Local 463 and/or Local 599 to be certified in the ICI sector; and would also permit Local 463 and Local 599 to be certified for their respective Board areas in the non-ICI units applied for”.

10. The respondent filed timely replies to these applications for certification. In Board File 1319-91-R the respondent agrees with the applicant's (U.A. Local 463) bargaining unit description and states there are nine employees in that unit. The respondent also agrees with the applicants (U.A. Local 599) bargaining unit description in Board File 1320-91-R and states there are nine employees in that unit. The respondent also filed a list of employees with respect to each application. Those lists each contain the same nine names of employees.

11. We fail to understand counsel's reference of membership evidence which “relates” to the ICI sector or his reference that either or both local unions “would have membership evidence for three persons in the ICI sector”. Membership evidence does not “relate” to any particular sector of the construction industry. Rather membership evidence relates to an individual person and the trade union to which that person has applied to become a member. What follows from that documentary evidence of membership in a trade union is the inference that persons who are members of a trade union wish that trade union to represent them in their employment relations with an employer howsoever the person is employed i.e. in the ICI sector, the residential sector or some other sector. (As to the correlation between the act of joining a trade union and a desire for trade union representation see *Unlimited textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraph 15).

12. In these applications therefore we have the membership evidence of two persons who have applied to become members of Local 463 and the membership evidence of two persons who have applied to be members of Local 599. Each of the applications for membership is evidence of membership in a particular local union of the United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and is *not* evidence of membership in any other local union of the U.A. Although evidence of membership in a local union is sufficient where an international or a parent union applies for certification, evidence of membership in an international union or of membership in a particular local of a union is not sufficient where it is a local other than the local to which the application for membership was made which applies for certification. (See, for example *Bernardin of Canada Limited*, [1975] OLRB Rep. Oct. 737, *The Explorer Inns, Limited*, [1978] OLRB Rep. June 541, *Wallaceburg Hydro Electric System*, [1975] OLRB Rep. Oct. 783, *Union Electric Supply Co. Limited*, [1983] OLRB Rep. May 829, *Menkes Developments Inc.*, [1987] OLRB Rep. Oct. 1290.

13. In Board File 1319-91-R the applicant is U.A. Local 46. There are only two pieces of membership evidence which relate to that applicant. The documentary evidence before the Board indicates that the bargaining unit consists of at least seven persons (as specified in the Form 80 Declaration filed by U.A. Local 46) and perhaps as many as nine persons (as indicated in the respondent's reply). The two applications for membership are thus numerically insufficient to either certify Local 46 for the bargaining unit which it seeks or to order the taking of representa-

tion vote pursuant to section 7(2) of the Act. The same holds true for the application by U.A. Local 599 in Board File 1320-91-R. The two applications for membership which relate to that applicant are numerically insufficient to certify Local 599 or to order a representation vote pursuant to section 7(2) of the Act as the Form 80 Declaration filed by Local 599 indicates there are at least seven persons in that bargaining unit.

14. In view of our decision herein we need not determine the sufficiency or propriety of the photocopied membership application and “certificate” which relates to membership in U.A. Local 46. U.A. Local 46 is not an applicant in these applications. Evidence of membership in U.A. Local 46 is not evidence of membership in either U.A. Local 463 or U.A. Local 599.

15. In an application for certification to which the construction industry provisions of the Act apply, the Board need not hold a hearing (section 102(14)). Given the unique nature of the construction industry and the transitory nature of persons employed in the construction industry, the Board often disposes of applications for certification in the construction industry without a hearing. The reasons for this have been articulated in many decisions of the Board. (See for example *Westdale Painting & Decorating Ltd.*, [1989] OLRB Rep. Sept. 984.) It is for this reason that applicants for certification in the construction industry must be most circumspect in the quality of the evidence of representation filed in support of a claim for bargaining rights.

16. In the result, having regard to the documentary evidence before us, and the provisions of the Act we hereby dismiss these applications.

CASE LISTINGS JULY 1991

	PAGE
1. Applications for Certification	171
2. Applications for First Contract Arbitration	180
3. Applications for Declaration of Related Employer.....	180
4. Sale of a Business	181
5. Union Successor Rights	181
6. Applications for Declaration Terminating Bargaining Rights.....	181
7. Ministerial Reference (Conciliation Officer)	182
8. Applications for Declaration of Unlawful Strike (Construction Industry)	182
9. Complaints of Unfair Labour Practice	182
10. Applications for Religious Exemption	186
11. Financial Statement	186
12. Applications for Determination of Employee Status.....	186
13. Complaints under the Occupational Health and Safety Act.....	186
14. Construction Industry Grievances	186
15. Applications for Reconsideration of Board's Decision	191

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2445-90-R: United Steelworkers of America (Applicant) v. Mannesmann Demag Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, and office and clerical staff" (44 employees in unit) (*Having regard to the agreement of the parties*)

0044-91-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Hotel Admiral at Harbourfront Inc. (Respondent)

Unit: "all employees of the respondent in their hotel operations in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (89 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0101-91-R: Communications & Electrical Workers of Canada (Applicant) v. MT&T (Media Tapes & Transcripts) Ltd. (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor and senior analyst" (26 employees in unit) (*Having regard to the agreement of the parties*)

0284-91-R: Harrow Ambulance Employees Association (Applicant) v. Harrow Ambulance Service (Respondent)

Unit: "all employees of the respondent in the Town of Harrow, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

0354-91-R: United Steelworkers of America (Applicant) v. Northland Power Partnership (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Kirkland Lake, save and except supervisors, persons above the rank of supervisor, office and clerical employees, and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

0420-91-R: International Association of Machinists & Aerospace Workers, Canadian Lodge No. 2754 (Applicant) v. Canadian Airlines International Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto and the City of Mississauga, save and except supervisors, persons above the rank of supervisor" (10 employees in unit)

0664-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction A Division of George Wimpey Canada Ltd. (Respondent)

Unit: "all construction labourers and truck drivers in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of North-

umberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (14 employees in unit)

0694-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eldan Electric Company Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (14 employees in unit)

0749-91-R: Ontario Public Service Employees Union (Applicant) v. Avenue II Community Program Services (Thunder Bay) Inc. (Respondent)

Unit: “all employees of the respondent in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period and persons employed on a cooperative training program with a school, college or university” (37 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0807-91-R: Ontario English Catholic Teacher’s Association (Applicant) v. Huron-Perth County Roman Catholic Separate School Board (Respondent)

Unit: “all occasional teachers as defined by section 1(a)(31) of the *Education Act* employed by the respondent in the Counties of Huron and Perth, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*” (72 employees in unit) (*Having regard to the agreement of the parties*)

0813-91-R: Canadian Union of Public Employees (Applicant) v. Unger Nursing Homes Ltd. (Respondent)

Unit #1: “all employees of the respondent at its Tufford Nursing Home and Tufford Manor Divisions in the City of St. Catharines, save and except the administrator, assistant administrator, activities director, professional medical staff, graduate and undergraduate nurses, graduate pharmacists, dietitians, office and clerical staff, supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (30 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at its Tufford Nursing Home and Tufford Manor Divisions in the City of St. Catharines, save and except the administrator, assistant administrator, activities director, professional medical staff; graduate and undergraduate nurses, graduate pharmacists, dietitians, office and clerical staff, supervisors and persons above the rank of supervisor” (30 employees in unit) (*Having regard to the agreement of the parties*)

0817-91-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses - Eastern Counties Branch (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the Victorian Order of Nurses - Eastern Counties Branch in the Counties of Stormont, Dundas, Glengarry, Prescott and Russell, save and except supervisors, persons above the rank of supervisor” (86 employees in unit) (*Having regard to the agreement of the parties*)

0828-91-R: Canadian Union of Public Employees (Applicant) v. Sault Ste. Marie District Roman Catholic School Board (Respondent)

Unit: “all employees of the respondent in the District of Sault Ste. Marie employed as teacher aides, save and

except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of June 10, 1991" (40 employees in unit) (*Having regard to the agreement of the parties*)

0829-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. W-A Construction Company Ltd. (Respondent)

Unit: "all employees of the respondent engaged in maintenance working out of 1183A Finch Avenue West, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

0849-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. Board of Education for the City of London (Respondent)

Unit: "all continuing education instructors employed by the respondent in London, save and except Administrators and Coordinators, persons above the rank of Administrator or Coordinator, and persons in bargaining units for which any trade union held bargaining rights as of June 13, 1991" (118 employees in unit) (*Having regard to the agreement of the parties*)

0859-91-R: United Steelworkers of America (Applicant) v. International Discus Corporation (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office and sales staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

0882-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Espanola Board of Education (Respondent)

Unit: "all educational assistants employed of the respondent in the District of Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff, Resource Centre assistant, Attendance Counsellor, speech language pathologist, Counsellor of Indian students, supply teachers and persons for whom any trade union held bargaining rights as of June 17, 1991" (16 employees in unit) (*Having regard to the agreement of the parties*)

0905-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Dufferin Construction Company, A Division of St. Lawrence Cement Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the employ of the respondent Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0939-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Able Atlantic Taxi (1989) Ltd. (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, taxi drivers, service centre staff and gas bar attendants" (17 employees in unit)

0948-91-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Decoma International Inc. (Respondent)

Unit: "all employees of the respondent in its Reflectar Industries Division in Richmond Hill, save and except supervisors, persons above the rank of supervisor, office and sales staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

0957-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Nadia Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0969-91-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Pheonix Powder Coating Inc. (Respondent)

Unit: "all employees of the respondent in the Township of Sandwich South, save and except supervisors, persons above the rank of supervisor, office and sales staff" (33 employees in unit) (*Having regard to the agreement of the parties*)

0998-91-R: Laundry & Linen Drivers & Industrial Workers Union, Local 847, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cleanwear Uniform Service Inc. c.o.b. Independent Linen Service (Respondent)

Unit: "all route persons (drivers) of the respondent in Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons for whom any trade union held bargaining rights as of June 24, 1991" (11 employees in unit) (*Having regard to the agreement of the parties*)

1009-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Friendship Construction Company Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1015-91-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Limelight Dinner Theatre Ltd. (Respondent)

Unit #1: "all employees of the respondent at the Limelight Dinner Theatre, 2026 Yonge St., Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, acting and technical personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit: "all employees of the respondent at the Limelight Dinner Theatre, 2026 Yonge St., Toronto, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, clerical, acting and technical personnel" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1017-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. Model Masonry (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of

Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1019-91-R: Canadian Union of Restaurant & Related Employees (Applicant) v. Easton's 28 Restaurants Ltd. c.o.b. Swiss Chalet Restaurant (Respondent) v. Group of Employees (Objectors)

Unit: "all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders of the respondent at Swiss Chalet restaurant, Port Hope, save and except Assistant Hostesses, persons above the rank of Assistant Hostess" (49 employees in unit) (*Having regard to the agreement of the parties*)

1033-91-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Hydro Electric Commission of Cambridge and North Dumfries (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the City of Cambridge, save and except supervisors, persons above the rank of supervisor, professional engineers, confidential secretary to the general manager, the energy adviser, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (30 employees in unit) (*Having regard to the agreement of the parties*)

1034-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. Recent Masonry (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1156-91-R: Canadian Union of Public Employees (Applicant) v. Brampton Caledon Association for the Mentally Retarded (Respondent)

Unit: "all residence, town house, and apartment employees of the respondent in Brampton, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except managers, persons above the rank of manager and persons employed for a definite term or task" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1164-91-R: Ontario Nurses' Association (Applicant) v. Versa-Care Ltd. (Respondent)

Unit: "all graduate and registered nurses employed in a nursing capacity by the respondent at its nursing home in Kincardine, save and except Director of care and persons above the rank of Director of Care" (5 employees in unit) (*Having regard to the agreement of the parties*)

1196-91-R: United Steelworkers of America (Applicant) v. ITT Industries of Canada Ltd. (Respondent)

Unit: "all employees of the respondent at its SWF Auto Electric Division in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons for whom any trade union held bargaining rights as of July 5, 1991" (8 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0674-91-R: Christian Labour Association of Canada (Applicant) v. Versa-Care Ltd. (Respondent) v. Canadian Union of Public Employees and its Local 1263 (Intervener)

Unit: "all employees of Versa-Care Limited at its Nursing Home in St. Catharines, save and except managers, persons above the rank of manager, office staff, and persons employed in bargaining units for which (1) Christian Labour Association of Canada and (2) Ontario Nurses' Association held bargaining rights as at May 29th, 1991" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	11

0675-91-R: Canadian Union of Public Employees (Applicant) v. Geri-Care Nursing Home of Caressant Care Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all employees of Geri-Care Nursing Home of Caressant Care Limited in its Nursing Home at Harriston, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff" (67 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	70
Persons struck off list on consent of parties	2
Number of persons on voter's list at start of vote	68
Number of names of persons on revised voters' list	68
Number of persons who cast ballots	56
Number of ballots marked in favour of applicant	18
Number of ballots marked in favour of intervener	38

0676-91-R: Canadian Union of Public Employees (Applicant) v. Geri-Care Nursing Home of Caressant Care Ltd. (Rest Home) (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all employees of Geri-Care Nursing Home of Caressant Care Limited in its Rest Home at Harriston, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, Registered and Graduate Nurses and office and clerical staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	5

0793-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Muskoka Board of Education (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the District of Muskoka, save and except supervisors, persons above the rank of supervisor, the Human Resource Department, the Accountant, the Purchasing Agent, the Transportation Officer, the Planning Officer, the Information Officer, the Payroll Officer, the Senior Payroll Clerk, Head Caretakers, secretaries and administrative assistants to supervisory officers and students employed in a cooperative work program" (63 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	64
Number of persons who cast ballots	56
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	25

0873-91-R: Teamsters Local Union No. 419 (Applicant) v. Ayer Storage (Ontario) (Respondent)

Unit: "all refrigeration compressor operators and stationary engineers in the employ of Ayer Storage (Ontario) at its plant at Metropolitan Toronto, save and except chief engineer" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2955-90-R: Timmins & District Hospital L'Hopital de Timmins et du District (Applicant) v. United Steelworkers of America, Local 7580 and Ontario Public Service Employees Union, Local 643 (Respondents)

Unit: "all lay employees of the Timmins and District Hospital, L'Hopital de Timmins et du District in the City of Timmins, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate and undergraduate pharmacists, graduate and students dietitians, chief engineer, paramedical and technical personnel, supervisors, foremen, persons above the rank of supervisor and foreman, secretaries in the executive Director's office, Secretary to the Director of Finance, Secretary to the Director of Nursing, Secretaries to the Director of Human Resources, and employees employed at its Porcupine facility, Bruce Avenue, South Porcupine" (321 employees in unit)

Number of names of persons on revised voters' list	321
Number of persons who cast ballots	205
Number of spoiled ballots	2
Number of ballots marked in favour of O.P.S.E.U.	68
Number of ballots marked in favour of Steelworkers	133
Ballots segregated and not counted	1

0493-91-R: United Steelworkers of America (Applicant) v. Pathex International Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and clerical staff, sales staff, design and draft staff, and students hired for the school vacation period" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	49
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	20
Ballots segregated and not counted	2

0506-91-R: Graphic Communications Union, Local 41M (Subordinate to Graphic Communications International Union) (Applicant) v. Thomson Newspapers Company Ltd. (Respondent) v. Communications Workers of America, Printing, Publishing & Media Workers Sector (Intervener)

Unit: "all composing room employees of the respondent at its Standard Freeholder Division" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	1

0582-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Anamet Canada Inc. (Respondent)

Unit: "all employees of the respondent in the Village of Lakeport, in the County of Northumberland, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
--	----

Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	2

Applications for Certification Dismissed Without Vote

1243-91-R: Operative Plasterers' & Cement Masons' International Association of the United States and Canada, Local 172 Restoration Steeplejacks (Applicant) v. Belair Restoration (Ontario) Inc. (Respondent) (25 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0529-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. The Hudson's Bay Company (Respondent)

Unit: "all employees of the respondent in Kitchener, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department supervisors, security staff, management trainees, office and clerical staff, persons employed in the hair salons, persons employed in the Toronto Distribution Centre Warehouse and students employed on a co-operative training program" (109 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	109
Number of persons who cast ballots	91
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	86
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	62
Ballots segregated and not counted	5

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3033-89-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. R. V. Campbell Commercial Laundry Services (1985) Inc., Select Laundry Ltd., Select Commercial Laundries Inc. (Respondents) v. Peter Goodall (Intervener)

Unit: "all employees of Select Commercial Laundries of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (28 employees in unit)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	21
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	17

0260-91-R: Ontario Nurses' Association (Applicant) v. St. Marys Memorial Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of St. Marys, save and except the Director of Nursing and persons above the rank of Director Nursing" (45 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	43
Number of ballots marked in favour of applicant	16

Number of ballots marked against applicant

27

0436-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. P. A. Hansen Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

0455-91-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. The Hospital for Sick Children (Respondent) v. Group of Employees (Objectors)

Unit: "all security guards employed by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	10

0588-91-R: Teamsters Local Union No. 879 (Applicant) v. Kon-Mag Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Waterloo, save and except Dispatcher, those above the rank of Dispatcher, office and sales staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	9

Applications for Certification Withdrawn

2907-90-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Asea Brown Boveri Inc. (Respondent) v. Cavalcade Leasing Inc. (Intervener)

3133-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Can-Co Aluminum Inc. (Respondent)

0408-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Fisher Development Inc. (Respondent)

0899-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Vision Masonry Inc. (Respondent)

0917-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. C.A.K. Masonry Ltd. (Respondent)

0992-91-R: Cold Springs Farms Employees' Association (Applicant) v. Cold Springs Farm Ltd. (Respondent)

1061-91-R: Canadian Union of Public Employees, Local 794 (Applicant) v. Hamilton Civic Hospitals (Respondent)

1136-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Homestead Land Holdings Ltd. (Respondent)

1158-91-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. (Central Electric) 683506 Ontario Inc. (Respondent)

1272-91-R: Construction Workers, Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. 940664 Ontario Inc. (o/a D & D Controls) (Respondent) v. International Brotherhood of Electrical Workers, Local 804 (Intervener)

1355-91-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Barné Builders Ltd. (Respondent)

1362-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Barne Builders Ltd. (Respondent)

1363-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. McEndon Ltd. (Respondent)

1368-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cleanol Services (Respondent)

1379-91-R: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Welco Mechanical Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1020-91-FC: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. 706969 Ontario Ltd. o/a Golden Griddle Pancake House (Respondent) (*Withdrawn*)

1057-91-FC: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Atlas Aluminum Division of 536132 Ontario Ltd. (Respondent) (*Granted*)

1163-91-FC: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Racal - Chubb Canada Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0498-89-R: Amalgamated Transit Union, Local 113 (Applicant) v. STM Specialized Transit Management Corporation, All-Way Transportation Corporation, Toronto Transit Commission (Respondents) (*Dismissed*)

2260-90-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. E. S. Fox Ltd., E. Spencer Construction Ltd. (Respondents) (*Dismissed*)

2986-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. 737049 Ontario Ltd. c.o.b. D'Luxe Drywall (1987), Stoney Creek Drywall Ltd., Saltfleet Drywall Inc. (Respondents) (*Withdrawn*)

3263-90-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Asea Brown Boveri Inc. and Cavalcade Leasing Inc. (Respondents) (*Withdrawn*)

0619-91-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Harbour Town Systems Ltd., Maher & Associates Ltd., Hemlock Contracting (Respondent) (*Withdrawn*)

0651-91-R; 0652-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Stewart & Bahl Construction Inc., Bahl Construction Inc. (Respondents) (*Withdrawn*)

0740-91-R: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Direct Interior Contractors Ltd. and F. D'Angelo Drywall Systems Ltd. (Respondents) (*Withdrawn*)

0743-91-R: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Studcon Drywall & Acoustics Ltd. and Crest Drywall & Acoustics Ltd. (Respondents) (*Granted*)

0830-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. W.A. Construction Company Ltd. and/or Falco Properties and/or Benleigh Apartments Ltd. and/or 8 Godstone Road (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0499-89-R: Amalgamated Transit Union, Local 113 (Applicant) v. STM Specialized Transit Management Corporation, All-Way Transportation Corporation, Toronto Transit Commission (Respondents) (*Dismissed*)

2987-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. 737049 Ontario Ltd. c.o.b. D'Luxe Drywall (1987), Stoney Creek Drywall Ltd., Saltfleet Drywall Inc. (Respondents) (*Withdrawn*)

0619-91-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Harbour Town Systems Ltd., Maher & Associates Ltd., Hemlock Contracting (Respondent) (*Withdrawn*)

0651-91-R; 0652-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Stewart & Bahl Construction Inc., Bahl Construction Inc. (Respondents) (*Withdrawn*)

0740-91-R: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Direct Interior Contractors Ltd. and F. D'Angelo Drywall Systems Ltd. (Respondents) (*Withdrawn*)

0743-91-R: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Studcon Drywall & Acoustics Ltd. and Crest Drywall & Acoustics Ltd. (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS

0816-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Westra Concrete Works, Post Concrete Services and 913257 Ontario Inc. c.o.b. as Westcor Contracting Inc., Elgin Concrete and C. Post Construction (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3028-90-R: Robin Thibault (Applicant) v. Services Employees Union, Local 268 (Respondent) v. Plummer Memorial Public Hospital (Intervener) (50 employees in unit) (*Granted*)

3348-90-R: Plummer Hospital Technical Unit Part-time c/o Margaret Rafter (Applicant) v. Services Employees Union, Local 268 (Respondent) v. Plummer Memorial Public Hospital (Intervener) (30 employees in unit) (*Dismissed*)

0660-91-R: Employees of “Lindsay This Week”, a division of Metroland Printing, Publishing & Distributing represented by J.B. Vida (Applicant) v. Peterborough Typographical Union, Local 248 (Respondent) v. Metroland Printing Publishing & Distributing a division of Harlequin Enterprises Ltd. (Intervener) (15 employees in unit) (*Granted*)

0717-91-R: Gordon J. Henderson (Applicant) v. United Food & Commercial Workers Union, Local 175 (Respondent) v. Edward W. Powell (Intervener) (*Withdrawn*)

0805-91-R: Laurie Mackay (Applicant) v. Teamsters Local Union No. 419 (Respondent) v. Debra McLeod (Intervener) (1 employee in unit) (*Dismissed*)

0995-91-R: JoAnne Pilon and The Sudbury Board of Education (Applicant) v. Ontario Secondary School Teachers’ Federation (Respondent) (*Withdrawn*)

1140-91-R: Brian Cook (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada and its Local 195 C.A.W. (Respondent) (3 employees in unit) (*Dismissed*)

1241-91-R: Shirley Jean Robinson (Applicant) v. Ontario Public Civil Service Union, Local 532 & Ministry of the Environment (Water Resources Branch) (Respondents) (*Dismissed*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

0388-91-M: 2628181 Manitoba Ltd. c.o.b. as ThunderBay Golden Nugget Saloon (Applicant) v. Hospitality Commercial & Services Employees Union, Local 73 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0537-91-U: The Electrical Power Systems Construction Association (EPSCA), and Ontario Hydro (Complainants) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 and Jim Phair, Fred Marr, Robert Farnsworth, Pat Packer, and Robert Chambers (Respondents) (*Withdrawn*)

1024-91-U: Millwright District Council of Ontario on its own behalf and on behalf of its Local 1151 (Applicant) v. Daycon Mechanical Systems Ltd., Sheet Metal Workers’ International Association, Local 397, James Reid and Barrie Pauluk (Respondents) (*Withdrawn*)

1465-91-U: Ellis-Don Construction Ltd. (Applicant) v. Labourers’ International Union of North America, Local 1059 and Jim McKinnon (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2828-88-U: Rhonda Deneau (Complainant) v. International Molders & Allied Workers, Local 49 (Respondent) (*Withdrawn*)

2792-89-U: Ugo Mio and The Hamilton Roman Catholic Caretakers and Maintenance Employees’ Association (Complainants) v. The Hamilton-Wentworth Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

0901-90-U: Mr. Ivan Gudelj (Complainant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL:CIO:CLC: (Respondent) (*Dismissed*)

1027-90-U: Labourers’ International Union of North America, Local 183 (Applicant) v. Toronto Structural Concrete Services Ltd. (Respondent) (*Granted*)

1603-90-U: United Brotherhood of Carpenters & Joiners of America, Local 38 (Complainant) v. Peter Kiewit

Sons Co. Ltd., Labourers' International Union of North America, Local 837 Ontario Provincial District Council, Labourers' International Union of North America (Respondents) (*Dismissed*)

1735-90-U: International Union of United Plant Guard Workers of America, Local 1962 (Complainant) v. Zaidan Realty Corporation (Respondent) (*Withdrawn*)

1850-90-U: United Steelworkers of America (Complainant) v. Guillevin International Inc. (Respondent) (*Withdrawn*)

2044-90-U: Marcel Fortin (Complainant) v. Millwright Local 1425 (Respondent) (*Dismissed*)

2134-90-U: Perino Smith (Complainant) v. CAW-TCA Canada Local 112 & The De Havilland Aircraft Company of Canada / A Division of Boeing of Canada Ltd. (Respondent) (*Dismissed*)

2172-90-U: R. Gaffney, L. Dorr, et al of Local 3767 (Complainants) v. United Steelworkers of America, Local 3767 (Respondent) (*Withdrawn*)

2212-90-U; 3422-90-U: Amalgamated Transit Union, Local 1572 (Complainant) v. McDonnell-Roland Limousine Services Ltd. o/a Airline Limousine Services Ltd. and Nick Lemonis (Respondents) (*Withdrawn*)

2681-90-U: Brewery, Malt & Soft Drink Workers, Local 304 (Complainant) v. Fabricland Distributors Inc. (Respondent) (*Granted*)

3112-90-U: Jack Zinn (Complainant) v. United Steelworkers of America (Respondent) v. Kroehler Furniture Company (Intervener) (*Dismissed*)

3193-90-U: London & District Service Workers' Union, Local 220 (Complainant) v. Strathroy Nursing Homes Ltd. (Respondent) (*Withdrawn*)

3247-90-U: William Metcalfe, Tullio Filosa and Angus Longmire (Complainants) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) (*Dismissed*)

3283-90-U: United Electrical, Radio & Machine Workers of Canada (UE) (Complainant) v. Asea Brown Beveri Inc. and Cavalcade Leasing Inc. (Respondents) (*Withdrawn*)

3400-90-U: Tim Oribine (Complainant) v. Local 414 of the Retail, Wholesale & Department Store Union, AFL:CIO:CLC:, Retail, Wholesale & Department Store Union, AFL:CIO:CLC: Representatives Association of Ontario (Respondents) (*Withdrawn*)

3409-90-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. Geiger International Ltd. (Respondent) (*Withdrawn*)

0019-91-U: Bruno Succui (Complainant) v. Jim Platt (Respondent) (*Withdrawn*)

0087-91-U: Graphic Communications International Union, Local 500M (Complainant) v. Rammgraph Ltd. (Respondent) (*Withdrawn*)

0277-91-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 1000 (Complainant) v. Sears Canada Inc. (Respondent) (*Withdrawn*)

0286-91-U: Lonnie K. Freeman (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

0421-91-U: Jeff Watson (Complainant) v. London & District Service Workers' Union, Service Employees' International Union, Local 220 (Respondents) v. Victoria Hospital Corporation (Intervener) (*Dismissed*)

0422-91-U: Jeff Watson (Complainant) v. Victoria Hospital Corporation (Respondent) (*Dismissed*)

0427-91-U: Doug Gallivan (Complainant) v. International Union of Operating Engineers, Local 796 (Respondent) v. York University (Intervener) (*Dismissed*)

0551-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Holiday Inn, Owen Sound, Ontario, Mr. Chopra, Ms. Dolly Sahni, and Mr. Raja Chopra (Respondents) (*Withdrawn*)

0559-91-U: Energy & Chemical Workers Union (Complainant) v. United Food & Commercial Workers International Union, Locals 175/633 (Respondent) v. John Clark Grievor (*Dismissed*)

0560-91-U: Energy & Chemical Workers Union (Complainant) v. United Food & Commercial Workers International Union, Locals 175/633 (Respondent) (*Withdrawn*)

0696-91-U: Joseph Kevin Tomasi (Complainant) v. Local Union IBEW 894 (Respondent) (*Withdrawn*)

0704-91-U: Joe Zinger (Complainant) v. Canadian Transport Workers Union (Respondent) (*Withdrawn*)

0705-91-U: Bruce Draper (Complainant) v. International Brotherhood of Electrical Workers, Local 773 (Respondent) v. Waffle's Electric Ltd. (Intervener) (*Withdrawn*)

0713-91-U: Denis Godin (Complainant) v. International Association of Machinists & Aerospace Workers, Local 1788 (Respondent) (*Withdrawn*)

0735-91-U: Gerald Corby (Complainant) v. Maple Leaf Products (Respondent) v. United Food & Commercial Workers International Union, Local 530P (Intervener) (*Withdrawn*)

0750-91-U: C.A.W., Local 1256 (Transit Unit) (Complainant) v. Corporation of the Town of Oakville (Respondent) (*Withdrawn*)

0751-91-U: Energy & Chemical Workers Union, Local 30 (Complainant) v. International Paper Canada Inc. (Respondent) (*Withdrawn*)

0773-91-U: United Food & Commercial Workers International Union, Local 530P (Complainant) v. Lancia-Bravo Foods, Division of The Borden Company Ltd. (Respondent) (*Withdrawn*)

0804-91-U: Robert James Mically (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Withdrawn*)

0815-91-U: Exhibition Place Labourers Operation Division, Local 506 (LIUNA) (Complainant) v. Board of Governors Exhibition Place and Executive of Local 506 (LIUNA) B. A. George Dixon and Secretary Treas. Nick Barbieri (Respondents) (*Withdrawn*)

0820-91-U: Service Employees' Union, Local 210 A.F. of L. - C.I.O. - C.L.C (Complainant) v. The Public General Hospital Chatham (Respondent) (*Withdrawn*)

0831-91-U: Stella Dranka & Teriq Nawaz (Complainants) v. Amalgamated Clothing & Textile Union (Respondent) (*Withdrawn*)

0852-91-U: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Complainant) v. Canada Catering Ltd. (Respondent) (*Withdrawn*)

0854-91-U: Alan Rasi (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, Toronto (Respondent) (*Withdrawn*)

0855-91-U: Petri Ottavainen (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, Toronto (Respondent) (*Withdrawn*)

0876-91-U: Ryan O'Neil (Complainant) v. United Food & Commercial Workers Union & Tom Gates, Union Steward, Tom Gates, Produce Manager, and Zehrs Market Ltd. and Michael Westman, Store Mgr. (Respondents) (*Withdrawn*)

0930-91-U: Danny Ouellette (Complainant) v. Local 387W (Pepsi/Cola) Ottawa Estcan Beverages (Respondent) (*Withdrawn*)

0972-91-U: Hotel, Motel & Restaurant Employees Union, Local 442 (Complainant) v. 706969 Ontario Ltd. o/a Golden Griddle Pancake House (Respondent) (*Withdrawn*)

0991-91-U: Canadian Paperworkers Union, Local 1144 (Complainant) v. Canadian Paperworkers Union, Local 301 (Respondent) v. Innova Envelope, Division of Abitibi-Price Inc. (Intervener) (*Withdrawn*)

0997-91-U: Ken Watson (Complainant) v. C.A.W. Canada (Respondent) (*Withdrawn*)

0999-91-U: Carolea E. Munn (Complainant) v. Ontario Public Service Employees Union and its Local 403 (Respondent) (*Withdrawn*)

1000-91-U: Carolea E. Munn (Complainant) v. Trenton Memorial Hospital (Respondent) (*Withdrawn*)

1021-91-U: Allan Kightley (Complainant) v. Hotel & Restaurant Union, Local 75 (Respondent) (*Withdrawn*)

1023-91-U: Canadian Union of Public Employees (Complainant) v. Foyer Richelieu (Respondent) (*Withdrawn*)

1030-91-U: Canadian Paperworkers Union (Complainant) v. Grant Forest Products Corp. (Respondent) (*Withdrawn*)

1091-91-U: Bakery, Confectionery & Tobacco Workers International Union, AFL:CIO:CLC:, Local 264 (Complainant) v. Mediterranean Bakery (Respondent) (*Withdrawn*)

1138-91-U: Robert James Mically (Complainant) v. Board of Governors (Respondent) (*Dismissed*)

1165-91-U: Maria Gonzales (Complainant) v. Leader & Union Offices International (Respondent) (*Dismissed*)

1212-91-U: Local D488 Dendum Truckers (Complainant) v. United Aggregates (Respondent) (*Dismissed*)

1222-91-U: John Barnes (Complainant) v. Labourers' International Union, Local 527; B. Carrozzi (Respondents) (*Withdrawn*)

1252-91-U: Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local 172 Restoration Steeplejacks (Applicant) v. Belair Restoration (Ontario) Inc. (Respondent) (*Withdrawn*)

1280-91-U: Robin Dale Haslehurst (Complainant) v. Centennial Hospital Linen Service (Respondent) (*Dismissed*)

1301-91-U: Ontario Public Service Employees Union (Complainant) v. Association of Canadian Community Colleges (Respondent) (*Withdrawn*)

1309-91-U: Reuben Gooden (Complainant) v. L. Brenders/Ivor Roberts (Respondents) (*Withdrawn*)

1310-91-U: Reuben Gooden (Complainant) v. Howard Kay (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1170-91-M: Patricia R. Bellemare (Applicant) v. Canadian Union of Public Employees, Local 3501 (Respondent Trade Union) v. The Boys Home (Respondent Employer) (*Withdrawn*)

FINANCIAL STATEMENT

0806-91-M: Manuel Martins (Complainant) v. Labourers' International Union of North America, Local 527/527A, Berardino Carrozzi Secretary - Treasurer (Respondent) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2908-90-M: Stothers Centre of Children & Families (Applicant) v. Ontario Public Service Employees Union and its Local 539 (Respondent) (*Dismissed*)

3025-90-M: Canadian Union of Public Employees (Applicant) v. Kirkland Lake District Association for the Mentally Retarded (Respondent) (*Dismissed*)

3064-90-M: Canadian Union of Public Employees (Applicant) v. The Lincoln County Humane Society (Respondent) (*Dismissed*)

0575-91-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Public Utilities Commission of the Corporation of the City of Chatham (Respondent) (*Withdrawn*)

0737-91-M: Association of Allied Health Professionals: Ontario (Applicant) v. Eastern Ontario Health Unit (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2687-90-OH: Eric Dagenais (Complainant) v. PCL Constructors Eastern Inc. (Respondent) (*Granted*)

3270-90-OH: Michael Saxon (Complainant) v. Eastside Management Inc. (Respondent) (*Withdrawn*)

0242-91-OH: John Matijasich (Complainant) v. Stelco Inc. (Respondent) (*Dismissed*)

0250-91-OH: Randy Lee Pratt (Complainant) v. Ford Motor Company of Canada Ltd. (Respondent) (*Withdrawn*)

0499-91-OH: Gladys Barnes (Complainant) v. Muskoka Sands & Joyce Penick (Respondents) (*Withdrawn*)

1211-91-OH: Diane Schalk (Complainant) v. Entech Laboratories (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1516-86-M: Ontario Sheet Metal Workers Conference (Applicant) v. Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

0327-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Engineering & Contracting Co. Ltd. (Respondent) (*Granted*)

1194-90-G; 1195-90-G; 1196-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Torino Drywall Systems (Respondent) (*Withdrawn*)

2095-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. E. S. Fox Ltd., E. Spencer Construction Ltd. (Respondents) (*Dismissed*)

2213-90-G; 2997-90-G: Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

2335-90-G: Ironworkers District Council of Ontario & International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicants) v. E. S. Fox Ltd. (Respondent) (*Dismissed*)

2369-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. J.D.R. Tools & Equipment, Division of 810332 Ontario Inc. (Respondent) (*Withdrawn*)

2988-90-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. 737049 Ontario Ltd. c.o.b. D'Luxe Drywall (1987), Stoney Creek Drywall Ltd., Saltfleet Drywall Inc. (Respondents) (*Withdrawn*)

3241-90-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Joe Arban Contractor Ltd. (Respondent) (*Dismissed*)

3281-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ideal Railings Ltd. (Respondent) (*Granted*)

3315-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 599 (Applicant) v. Mainway Industrial Installations Inc. (Respondent) (*Withdrawn*)

0340-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Power Pac Construction Co. Ltd. (Respondent) (*Withdrawn*)

0449-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. F. D'Angelo Drywall Systems Ltd. (Respondent) (*Granted*)

0450-91-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Acoustique Piche Inc. (Respondent) (*Withdrawn*)

0485-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Toddglen Construction Ltd. (Respondent) (*Withdrawn*)

0503-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

0527-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Board of Governors of Exhibition Place (Respondent) (*Withdrawn*)

0538-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Fisher Development Inc. (Respondent) (*Withdrawn*)

0546-91-G; 0547-91-G; 0623-91-G; 0631-91-G; 0632-91-G: International Association of Bridge, Structural & Ornamental Ironworkers and Ornamental Ironworkers, Local 700 (Applicants) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

0564-91-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Beaver Engineering Ltd. (Respondent) (*Withdrawn*)

0577-91-G: Labourers' International Union of North America, Local 1059 (Applicant) v. 913257 Ontario Inc., Wescor Contracting Inc., Post Concrete Services and C. Post Construction (Respondents) (*Withdrawn*)

0590-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Ltd. (Respondent) (*Granted*)

0620-91-G; 0732-91-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Harbour Town Systems Ltd., Maher & Associates Ltd., Hemlock Contracting (Respondents) (*Withdrawn*)

0639-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Parkwall Forming Ltd. (Respondent) (*Granted*)

0650-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Stewart & Bahl Construction Inc., Bahl Construction Inc. (Respondents) (*Withdrawn*)

0701-91-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Meadowest Erectors Inc. (Respondent) (*Granted*)

0741-91-G; 0742-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Studcon Drywall & Acoustics Ltd. (Respondent) (*Granted*)

0808-91-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Waffle's Electric Ltd. (Respondent) (*Granted*)

0812-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Globe Excavation & Grading Ltd. (Respondent) (*Granted*)

0825-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Marc Lalonde Carpet (Division of 375601 Ontario Ltd.) (Respondent) (*Granted*)

0871-91-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Norseman Drywall Ltd. (Respondent) (*Granted*)

0913-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. K.P. Industrial Service (Respondent) (*Granted*)

0926-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hdyro (Respondent) (*Granted*)

0931-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Terron Mechanical Ltd. (Respondent) (*Withdrawn*)

0936-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (*Granted*)

0937-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dalv Construction Ltd. (Respondent) (*Granted*)

0938-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hdyro (Respondent) (*Dismissed*)

0943-91-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Selco Elevator (Respondent) (*Withdrawn*)

0944-91-G: International Union of Elevator Constructors, Local 50 (Applicant) v. K-Elevator Interiors Ltd. (Respondent) (*Granted*)

979-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. 564712 Ontario Inc. c.o.b. as Eagle Earth Moving (Respondent) (*Granted*)

0986-91-G: International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicant) v. A. Gorgi Masonry (1976) Ltd. and Gorgi Construction Ltd. (Respondents) (*Withdrawn*)

1005-91-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081 (Applicants) v. The Austin Company Ltd. (Respondent) (*Granted*)

1006-91-G: International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicant) v. The Austin Company Ltd. (Respondent) (*Granted*)

1007-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Resource Construction Ltd. (Respondent) (*Withdrawn*)

1010-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Trenton Crane Service (1984), Div. of 548205 Ontario Inc. (Respondent) (*Granted*)

1012-91-G: International Brotherhood of Painters & Allied Trades, Local 1824 Painters (Applicant) v. Regional Glass & Mirror (Respondent) (*Granted*)

1013-91-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. City Acoustics Ltd. (Respondent) (*Granted*)

1048-91-G: Labourers' International Union of North America, Local 1059 (Applicant) v. C. H. Excavating (London) Ltd. (Respondent) (*Withdrawn*)

1066-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. A.N.H. Glass Ltd./Aspen Glass Ltd. (Respondent) (*Granted*)

1067-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Y.G.S. Inc. (Respondent) (*Granted*)

1068-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Granted*)

1072-91-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Dominion Painting Ltd. (Respondent) (*Withdrawn*)

1073-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tony Di-Monte Drainage Ltd. (Respondent) (*Withdrawn*)

1080-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Danielle Design (Respondent) (*Withdrawn*)

1084-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Torino Drywall Systems (Respondent) (*Granted*)

1094-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Gaston H. Poulin Contractor Ltd. (Respondent) (*Withdrawn*)

1128-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Gilcar Supervisor & Management Ltd. (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener) (*Withdrawn*)

1133-91-G: International Brotherhood of Painters & Allied Trades, District Council 46 (Applicant) v. Paintech Decorating Ltd. (Respondent) (*Granted*)

1142-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pacer Panel Systems Inc. (Respondent) (*Withdrawn*)

1174-91-G: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Doran Construction (Respondent) (*Withdrawn*)

1179-91-G: Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local 598 (Applicant) v. Toronto Structural Concrete Services (Respondent) (*Granted*)

1200-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 819185 Ontario Ltd. (Respondent) (*Withdrawn*)

1201-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Baker Installations Ltd. (Respondent) (*Withdrawn*)

1202-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Baxcan (Respondent) (*Withdrawn*)

1203-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. James A. Rice Ltd. (Respondent) (*Withdrawn*)

1230-91-G: Labourers' International Union of North America, Local 527 (Applicant) v. Form-All Construction Ltd. (Respondent) (*Withdrawn*)

1236-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Seneca Interior Construction (Respondent) (*Withdrawn*)

1237-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Wood Systems (Respondent) (*Granted*)

1238-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Conti Forming Co. Ltd. (Respondent) (*Withdrawn*)

1239-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Murphy Construction (Respondent) (*Withdrawn*)

1245-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Motor City Crane Rentals Ltd. (Respondent) (*Withdrawn*)

1246-91-G: The Ontario Allied Construction Trades Council, and Labourers' International Union of North America, Local 1089 (Applicants) v. Dafoe Floor (London) Ltd. and The Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)

1258-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Adelaide Electric Ltd. (Respondent) (*Withdrawn*)

1287-91-G; 1370-91-G; 1394-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Ltd. (Respondent) (*Withdrawn*)

1335-91-G: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Applicant) v. 638425 Ontario Ltd. General Manufactured Housing (Respondent) (*Withdrawn*)

1342-91-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Valley Interiors (Respondent) (*Withdrawn*)

1345-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Teskey Construction Co. Ltd. (Respondent) (*Withdrawn*)

1347-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Wood 'N' Nail (Respondent) (*Granted*)

1357-91-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Overhead Door Co. of Thunder Bay Ltd. (Respondent) (*Withdrawn*)

1380-91-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. D'Arcy Sweeney Ltd. (Respondent) (*Withdrawn*)

1411-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ferma Construction Inc. (Respondent) (*Withdrawn*)

1420-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Force Electric (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3236-90-U: Howard Buchin (Complainant) v. Toronto Civic Employee's Union, Local 43 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

CADON
LR
-054

Government
Publication

ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1991



Ontario

ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	M.G. MITCHNICK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	M. BENDEL
	L. DAVIE
	N.V. DISSANAYAKE
	O.V. GRAY
	R.J. HERMAN
	B. HERLICH
	R.D. HOWE
	J. JOHNSTON
	B. KELLER
	P. KNOPF
	S. LIANG
	J. McCORMACK
	M.A. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	I.M. STAMP
	G. SURDYKOWSKI
	S.A. TACON

Members

J. ANDERSON	J.W. MURRAY
B.L. ARMSTRONG	W.S. O'NEILL
C.A. BALLENTINE	D.A. PATTERSON
W.A. CORRELL	H. PEACOCK
K.S. DAVIES	R.W. PIRRIE
A.R. FOUCAULT	F.B. REAUME
W.N. FRASER	J. REDSHAW
P.V. GRASSO	K.V. ROGERS
A. HERSHKOVITZ	J.A. RONSON
M. JONES	M.A. ROSS
F. KELLY	J.A. RUNDLE
J. KENNEDY	G.O. SHAMANSKI
H. KOBRYN	R.M. SLOAN
J. KURCHAK	E.G. THEOBALD
J. LEAR	J. TRIM
D.A. MacDONALD	M. VUKOBRAT
W.J. McCARRON	S. WESLAK
C. McDONALD	W.H. WIGHTMAN
R.D. McMURDO	N.A. WILSON
R.R. MONTAGUE	D.G. WOZNIAK

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	K. HEWSON
	R. LEBI
	K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1991] OLRB REP. SEPTEMBER

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1.	Consamar Inc.; Re L.I.U.N.A.; Re Pipeline Contractors Association of Canada; Re Teamsters Union, Locals 91, 141, 230, 879, 880, 990, 989	1021
2.	David Chapman's Ice Cream Limited; Re Timothy McCarthy; Re U.F.C.W., Local 175/633	1030
3.	Donia Aluminum & Roofing Ltd.; Re C.J.A., Local 27	1034
4.	Ellis-Don Limited and Greenspoon Bros. Limited and the Metropolitan Toronto Demolition Contractors Inc. and I.U.O.E., Local 793; Re L.I.U.N.A., Ontario Provincial District Council and L.I.U.N.A., Local 837	1036
5.	E Z Line Construction Ltd. (#882967 Ontario Ltd.), The Electrical Power Systems Construction Association; Re S.M.W., Local 392; Re Lake Ontario District Council, C.J.A.	1041
6.	Fanshawe College of Applied Arts & Technology; Re O.P.S.E.U.	1044
7.	Gallant Painting, 715329 Ontario Ltd., c.o.b. as and 615823 Ontario Inc. c.o.b. as Lindsay Maintenance Services Painting Division; Re P.A.T., Local 1590	1051
8.	Georgian Industries Inc.; Re A.C.T.W.U.	1067
9.	Metroland Printing, Publishing & Distributing and the Mississauga News; Re G.C.I.U., Local 500M; Re Harlequin Enterprises Limited through its divisions the Mississauga News and Metroland Printing, Publishing and Distributing	1069
10.	Northern Communications Services Ltd.; Re S.E.I.U., Local 478	1089
11.	Port Weller Dry Docks, a Division of Canadian Ship Building and Engineering Ltd.; Re I.U.O.E., Local 793; Re B.B.F., Local 680; Re I.B.E.W., Local 303	1090
12.	Sault Ste. Marie, The Corporation of the City of; Re L.I.U.N.A., Local 1036	1091
13.	Sealy Upholstery Canada Inc. and/or Price Waterhouse Limited and/or William Stuart Nathanson c.o.b. as Brighton Furniture and/or Nopans Ventures Ltd. and/or 883727 Ontario Inc.; Re Laundry and Linen Drivers and Industrial Workers Union, Teamsters Union, Local 847	1096
14.	Toronto Hospital, The; Re O.N.A.	1098

COURT PROCEEDINGS

1.	Chapleau Forest Products Limited; Re Ontario Labour Relations Board, IWA-Canada, and IWA-Canada, Local 1-2995	1108
----	---	------

SUBJECT INDEX

- Adjournment - Practice and Procedure - Related Employer - Sale of a Business - Counsel failing to collect and advise Registrar of dates for hearing convenient for all parties - Counsel unable to arrange dates acceptable to everyone and requesting that the matter be scheduled by the Board without agreement of all parties - Registrar scheduling 5 dates for hearing and parties subsequently agreeing to adjourn all but one - Parties advised that as result of their conduct in scheduling of this matter, Board unlikely to have further hearing dates available prior to March 1992
- SEALY UPHOLSTERY CANADA INC. AND/OR PRICE WATERHOUSE LIMITED
AND/OR WILLIAM STUART NATHANSON C.O.B. AS BRIGHTON FURNITURE
AND/OR NOPANS VENTURES LTD. AND/OR 883727 ONTARIO INC.; RE LAUN-
DRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, TEAM-
STERS UNION, LOCAL 847 1096
- Adjournment - Practice and Procedure - Witness - Unfair Labour Practice - Complainant alleging that witnesses summonsed by union in certification proceeding were disciplined because they were so summonsed - Company seeking adjournment due to unavailability of witness - Counsel for company giving various undertakings - Board directing that the action taken against the grievors by the company be cancelled and that copies of the Board's decision be posted in the workplace - Adjournment granted
- GEORGIAN INDUSTRIES INC.; RE A.C.T.W.U. 1067
- Bargaining Unit - Certification - Construction Industry - Operating Engineers union seeking to carve out its traditional bargaining unit in displacement application - Board satisfied that business of repairing or building ships in dry docks not constituting business in construction industry - Application withdrawn with leave
- PORT WELLER DRY DOCKS, A DIVISION OF CANADIAN SHIP BUILDING AND
ENGINEERING LTD.; RE I.U.O.E., LOCAL 793; RE B.B.F., LOCAL 680; RE
I.B.E.W., LOCAL 303 1090
- Bargaining Unit - Certification - Construction Industry - Union seeking unit of carpenters engaged in installation of exterior cladding systems - Board hearing nothing which would cause it to depart from its usual practice that in a construction industry certification application a craft union must seek to represent all members of its craft employed by the employer - Board declining to grant union's request to describe unit by including words "engaged in the installation of exterior cladding systems"
- DONIA ALUMINUM & ROOFING LTD.; RE C.J.A., LOCAL 27 1034
- Bargaining Unit - Sale of a Business - Toronto General Hospital and Toronto Western Hospital merging into The Toronto Hospital in 1986 - ONA representing nurses in separate bargaining units at both locations - Hospital making application under section 63 and asking Board to declare that there should be only one full-time and only one part-time bargaining unit for both locations - Board satisfied that concerns raised by Hospital are matters to be addressed by the parties through bargaining, and not by the Board through an exercise of powers under section 63(6) of the *Act* - Application dismissed
- TORONTO HOSPITAL, THE; RE O.N.A. 1098
- Certification - Bargaining Unit - Construction Industry - Operating Engineers union seeking to carve out its traditional bargaining unit in displacement application - Board satisfied that

II

business of repairing or building ships in dry docks not constituting business in construction industry - Application withdrawn with leave	
PORT WELLER DRY DOCKS, A DIVISION OF CANADIAN SHIP BUILDING AND ENGINEERING LTD.; RE I.U.O.E., LOCAL 793; RE B.B.F., LOCAL 680; RE I.B.E.W., LOCAL 303	1090
Certification - Bargaining Unit - Construction Industry - Union seeking unit of carpenters engaged in installation of exterior cladding systems - Board hearing nothing which would cause it to depart from its usual practice that in a construction industry certification application a craft union must seek to represent all members of its craft employed by the employer - Board declining to grant union's request to describe unit by including words "engaged in the installation of exterior cladding systems"	
DONIA ALUMINUM & ROOFING LTD.; RE C.J.A., LOCAL 27	1034
Certification - Constitutional Law - Reconsideration - Five years after certification, employer seeking reconsideration of Board's decision to certify on ground that employer's business a federal work or undertaking - Matter not raised at appropriate time - Reconsideration application dismissed	
NORTHERN COMMUNICATIONS SERVICES LTD.; RE S.E.I.U., LOCAL 478	1089
Certification - Evidence - Judicial Review - Membership Evidence - Membership cards headed by name of local union bringing certification application, but body of cards referring only to national union - Board ruling cards valid membership evidence for local union - Employer seeking judicial review - Court observing that Board made purely factual determination and that interpretation of a union membership form lay at the heart of Board's specialized jurisdiction - Judicial review application dismissed by Divisional Court - Court of Appeal dismissing application for leave to appeal	
CHAPLEAU FOREST PRODUCTS LIMITED; RE ONTARIO LABOUR RELATIONS BOARD, IWA-CANADA, AND IWA-CANADA, LOCAL 1-2995	1108
Colleges Collective Bargaining Act - Employee - Employee Reference - Board assessing status of Information Officer, Programme Manager, Parking and Transportation Supervisor, Futures Manager, Ontario Basic Skills Manager and various Administrative Assistants - Board determining certain persons "employees" and others not "employees" with meaning of <i>Colleges Collective Bargaining Act</i>	
FANSHAWE COLLEGE OF APPLIED ARTS & TECHNOLOGY; RE O.P.S.E.U.	1044
Collective Agreement - Termination - Timeliness - Whether termination application timely - Board concluding that parties arrived at final resolution of collective agreement portion of matters in dispute between them on July 11 - Termination application filed on July 12, within hours of news of the "settlement" having come to the plant, accordingly found to be untimely - Application dismissed	
DAVID CHAPMAN'S ICE CREAM LIMITED; RE TIMOTHY MCCARTHY; RE U.F.C.W., LOCAL 175/633	1030
Constitutional Law - Certification - Reconsideration - Five years after certification, employer seeking reconsideration of Board's decision to certify on ground that employer's business a federal work or undertaking - Matter not raised at appropriate time - Reconsideration application dismissed	
NORTHERN COMMUNICATIONS SERVICES LTD.; RE S.E.I.U., LOCAL 478	1089
Construction Industry - Bargaining Unit - Certification - Operating Engineers union seeking to carve out its traditional bargaining unit in displacement application - Board satisfied that	

business of repairing or building ships in dry docks not constituting business in construction industry - Application withdrawn with leave

PORT WELLER DRY DOCKS, A DIVISION OF CANADIAN SHIP BUILDING AND
ENGINEERING LTD.; RE I.U.O.E., LOCAL 793; RE B.B.F., LOCAL 680; RE
I.B.E.W., LOCAL 303 1090

Construction Industry - Bargaining Unit - Certification - Union seeking unit of carpenters engaged in installation of exterior cladding systems - Board hearing nothing which would cause it to depart from its usual practice that in a construction industry certification application a craft union must seek to represent all members of its craft employed by the employer - Board declining to grant union's request to describe unit by including words "engaged in the installation of exterior cladding systems"

DONIA ALUMINUM & ROOFING LTD.; RE C.J.A., LOCAL 27 1034

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Sheet Metal Workers contending that assembly of "meter shed" should have been assigned to them - Carpenters asserting well-established practice of assigning work to "mixed crews" of carpenters and labourers - Carpenters and employer submitting that body of work in dispute so small that it does not warrant potentially time-consuming and expensive jurisdictional dispute inquiry - Up to the parties to do the necessary cost/benefit analysis and determine whether litigation really necessary - Application under section 124 of the *Act* adjourned pending filing of jurisdictional dispute

E Z LINE CONSTRUCTION LTD. (#882967 ONTARIO LTD.), THE ELECTRICAL
POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE S.M.W., LOCAL 392; RE
LAKE ONTARIO DISTRICT COUNCIL, C.J.A. 1041

Construction Industry - Construction Industry Grievance - Practice and Procedure - Timeliness - Grievance filed in June regarding work assignment made in February - Company arguing that grievance untimely - Board exercising discretion under section 44(6) of the *Act* to extend time limits so that dispute at basis of the matter can be resolved

CONSAMAR INC.; RE L.I.U.N.A.; RE PIPELINE CONTRACTORS ASSOCIATION
OF CANADA; RE TEAMSTERS UNION, LOCALS 91, 141, 230, 879, 880, 990, 989 1021

Construction Industry - First Contract Arbitration - Labourers certified in 1987 - Municipal employer advising union that it did not intend to hire labourers under the Labourers' collective agreement, but intended rather to assign work of construction labourers to CUPE members - City also refusing to include subcontracting clauses proposed by Labourers - Employer position rendering Labourers' bargaining rights virtually meaningless - Board finding that employer refusing to recognize the bargaining authority of the trade union - First contract arbitration directed

SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A.,
LOCAL 1036 1091

Construction Industry - Jurisdictional Dispute - Sub-contractor using Labourers to operate certain heavy machinery - Operating Engineers grieving against general contractor and asking it to only employ sub-contractors in contractual relations with it to perform work as set out in collective agreement - Operating Engineers suggesting to sub-contractor that collective agreement be signed and that Operating Engineers run the heavy equipment - Board earlier deferring s.124 application and Labourers filing jurisdictional complaint - Preliminary issue as to whether Board has jurisdiction under s.91 of the *Act* to hear complaint - Board concluding that demand for work was made "of the employer" within meaning of s.91 -

IV

Demand for work need not be unequivocal in nature - Board satisfied that it has jurisdiction to entertain complaint

ELLIS-DON LIMITED AND GREENSPOON BROS. LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS INC. AND I.U.O.E., LOCAL 793; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 837.....

1036

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Sheet Metal Workers contending that assembly of "meter shed" should have been assigned to them - Carpenters asserting well-established practice of assigning work to "mixed crews" of carpenters and labourers - Carpenters and employer submitting that body of work in dispute so small that it does not warrant potentially time-consuming and expensive jurisdictional dispute inquiry - Up to the parties to do the necessary cost/benefit analysis and determine whether litigation really necessary - Application under section 124 of the *Act* adjourned pending filing of jurisdictional dispute

E Z LINE CONSTRUCTION LTD. (#882967 ONTARIO LTD.), THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE S.M.W., LOCAL 392; RE LAKE ONTARIO DISTRICT COUNCIL, C.J.A.

1041

Construction Industry Grievance - Construction Industry - Practice and Procedure - Timeliness - Grievance filed in June regarding work assignment made in February - Company arguing that grievance untimely - Board exercising discretion under section 44(6) of the *Act* to extend time limits so that dispute at basis of the matter can be resolved

CONSAMAR INC.; RE L.I.U.N.A.; RE PIPELINE CONTRACTORS ASSOCIATION OF CANADA; RE TEAMSTERS UNION, LOCALS 91, 141, 230, 879, 880, 990, 989

1021

Employee - Colleges Collective Bargaining Act - Employee Reference - Board assessing status of Information Officer, Programme Manager, Parking and Transportation Supervisor, Futures Manager, Ontario Basic Skills Manager and various Administrative Assistants - Board determining certain persons "employees" and others not "employees" with meaning of *Colleges Collective Bargaining Act*

FANSHAWE COLLEGE OF APPLIED ARTS & TECHNOLOGY; RE O.P.S.E.U.

1044

Employee Reference - Colleges Collective Bargaining Act - Employee - Board assessing status of Information Officer, Programme Manager, Parking and Transportation Supervisor, Futures Manager, Ontario Basic Skills Manager and various Administrative Assistants - Board determining certain persons "employees" and others not "employees" with meaning of *Colleges Collective Bargaining Act*

FANSHAWE COLLEGE OF APPLIED ARTS & TECHNOLOGY; RE O.P.S.E.U.

1044

Evidence - Certification - Judicial Review - Membership Evidence - Membership cards headed by name of local union bringing certification application, but body of cards referring only to national union - Board ruling cards valid membership evidence for local union - Employer seeking judicial review - Court observing that Board made purely factual determination and that interpretation of a union membership form lay at the heart of Board's specialized jurisdiction - Judicial review application dismissed by Divisional Court - Court of Appeal dismissing application for leave to appeal

CHAPLEAU FOREST PRODUCTS LIMITED; RE ONTARIO LABOUR RELATIONS BOARD, IWA-CANADA, AND IWA-CANADA, LOCAL 1-2995

1108

First Contract Arbitration - Construction Industry - Labourers certified in 1987 - Municipal employer advising union that it did not intend to hire labourers under the Labourers' collective agreement, but intended rather to assign work of construction labourers to CUPE members - City also refusing to include subcontracting clauses proposed by Labourers -

Employer position rendering Labourers' bargaining rights virtually meaningless - Board finding that employer refusing to recognize the bargaining authority of the trade union - First contract arbitration directed

SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A., LOCAL 1036..... 1091

Judicial Review - Certification - Evidence - Membership Evidence - Membership cards headed by name of local union bringing certification application, but body of cards referring only to national union - Board ruling cards valid membership evidence for local union - Employer seeking judicial review - Court observing that Board made purely factual determination and that interpretation of a union membership form lay at the heart of Board's specialized jurisdiction - Judicial review application dismissed by Divisional Court - Court of Appeal dismissing application for leave to appeal

CHAPLEAU FOREST PRODUCTS LIMITED; RE ONTARIO LABOUR RELATIONS BOARD, IWA-CANADA, AND IWA-CANADA, LOCAL 1-2995 1108

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Sheet Metal Workers contending that assembly of "meter shed" should have been assigned to them - Carpenters asserting well-established practice of assigning work to "mixed crews" of carpenters and labourers - Carpenters and employer submitting that body of work in dispute so small that it does not warrant potentially time-consuming and expensive jurisdictional dispute inquiry - Up to the parties to do the necessary cost/benefit analysis and determine whether litigation really necessary - Application under section 124 of the *Act* adjourned pending filing of jurisdictional dispute

E Z LINE CONSTRUCTION LTD. (#882967 ONTARIO LTD.), THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE S.M.W., LOCAL 392; RE LAKE ONTARIO DISTRICT COUNCIL, C.J.A. 1041

Jurisdictional Dispute - Construction Industry - Sub-contractor using Labourers to operate certain heavy machinery - Operating Engineers grieving against general contractor and asking it to only employ sub-contractors in contractual relations with it to perform work as set out in collective agreement - Operating Engineers suggesting to sub-contractor that collective agreement be signed and that Operating Engineers run the heavy equipment - Board earlier deferring s.124 application and Labourers filing jurisdictional complaint - Preliminary issue as to whether Board has jurisdiction under s.91 of the *Act* to hear complaint - Board concluding that demand for work was made "of the employer" within meaning of s.91 - Demand for work need not be unequivocal in nature - Board satisfied that it has jurisdiction to entertain complaint

ELLIS-DON LIMITED AND GREENSPOON BROS. LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS INC. AND I.U.O.E., LOCAL 793; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 837 1036

Membership Evidence - Certification - Evidence - Judicial Review - Membership cards headed by name of local union bringing certification application, but body of cards referring only to national union - Board ruling cards valid membership evidence for local union - Employer seeking judicial review - Court observing that Board made purely factual determination and that interpretation of a union membership form lay at the heart of Board's specialized jurisdiction - Judicial review application dismissed by Divisional Court - Court of Appeal dismissing application for leave to appeal

CHAPLEAU FOREST PRODUCTS LIMITED; RE ONTARIO LABOUR RELATIONS BOARD, IWA-CANADA, AND IWA-CANADA, LOCAL 1-2995 1108

Practice and Procedure - Adjournment - Related Employer - Sale of a Business - Counsel failing

to collect and advise Registrar of dates for hearing convenient for all parties - Counsel unable to arrange dates acceptable to everyone and requesting that the matter be scheduled by the Board without agreement of all parties - Registrar scheduling 5 dates for hearing and parties subsequently agreeing to adjourn all but one - Parties advised that as result of their conduct in scheduling of this matter, Board unlikely to have further hearing dates available prior to March 1992

SEALY UPHOLSTERY CANADA INC. AND/OR PRICE WATERHOUSE LIMITED
AND/OR WILLIAM STUART NATHANSON C.O.B. AS BRIGHTON FURNITURE
AND/OR NOPANS VENTURES LTD. AND/OR 883727 ONTARIO INC.; RE LAUN-
DRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, TEAM-
STERS UNION, LOCAL 847.....

1096

Practice and Procedure - Adjournment - Witness - Unfair Labour Practice - Complainant alleging that witnesses summonsed by union in certification proceeding were disciplined because they were so summonsed - Company seeking adjournment due to unavailability of witness - Counsel for company giving various undertakings - Board directing that the action taken against the grievors by the company be cancelled and that copies of the Board's decision be posted in the workplace - Adjournment granted

GEORGIAN INDUSTRIES INC.; RE A.C.T.W.U.....

1067

Practice and Procedure - Construction Industry - Construction Industry Grievance - Timeliness - Grievance filed in June regarding work assignment made in February - Company arguing that grievance untimely - Board exercising discretion under section 44(6) of the *Act* to extend time limits so that dispute at basis of the matter can be resolved

CONSAMAR INC.; RE L.I.U.N.A.; RE PIPELINE CONTRACTORS ASSOCIATION
OF CANADA; RE TEAMSTERS UNION, LOCALS 91, 141, 230, 879, 880, 990, 989.....

1021

Reconsideration - Certification - Constitutional Law - Five years after certification, employer seeking reconsideration of Board's decision to certify on ground that employer's business a federal work or undertaking - Matter not raised at appropriate time - Reconsideration application dismissed

NORTHERN COMMUNICATIONS SERVICES LTD.; RE S.E.I.U., LOCAL 478.....

1089

Related Employer - Adjournment - Practice and Procedure - Sale of a Business - Counsel failing to collect and advise Registrar of dates for hearing convenient for all parties - Counsel unable to arrange dates acceptable to everyone and requesting that the matter be scheduled by the Board without agreement of all parties - Registrar scheduling 5 dates for hearing and parties subsequently agreeing to adjourn all but one - Parties advised that as result of their conduct in scheduling of this matter, Board unlikely to have further hearing dates available prior to March 1992

SEALY UPHOLSTERY CANADA INC. AND/OR PRICE WATERHOUSE LIMITED
AND/OR WILLIAM STUART NATHANSON C.O.B. AS BRIGHTON FURNITURE
AND/OR NOPANS VENTURES LTD. AND/OR 883727 ONTARIO INC.; RE LAUN-
DRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, TEAM-
STERS UNION, LOCAL 847.....

1096

Related Employer - Unfair Labour Practice - Board not persuaded that decision to implement new technology motivated by anti-union animus - Unfair labour practice complaint dismissed - Board viewing respondents' operations as sufficiently distinct so as to permit, yet sufficiently related so as to warrant, application of related employer provisions of the *Act* -

Mere fact that entities in question not legal or corporate entities not, of itself, precluding application of section 1(4) - Related employer declaration issuing

METROLAND PRINTING, PUBLISHING & DISTRIBUTING AND THE MISSISSAUGA NEWS; RE G.C.I.U., LOCAL 500M; RE HARLEQUIN ENTERPRISES LIMITED THROUGH ITS DIVISIONS THE MISSISSAUGA NEWS AND METROLAND PRINTING, PUBLISHING AND DISTRIBUTING 1069

Remedies - Sale of a Business - Painting company ceasing operations following, and as a result of, union's certification - Painting company's owner and "key man" subsequently hired to manage maintenance company's new painting division - Maintenance company thereby acquiring not only key man's expertise and reputation, but also painting company's "goodwill" and place on customer's bid list - Board finding sale of a business and declaring union to be bargaining agent for all employees of the maintenance company's painting division

GALLANT PAINTING, 715329 ONTARIO LTD., C.O.B. AS AND 615823 ONTARIO INC. C.O.B. AS LINDSAY MAINTENANCE SERVICES PAINTING DIVISION; RE P.A.T., LOCAL 1590 1051

Sale of a Business - Adjournment - Practice and Procedure - Related Employer - Counsel failing to collect and advise Registrar of dates for hearing convenient for all parties - Counsel unable to arrange dates acceptable to everyone and requesting that the matter be scheduled by the Board without agreement of all parties - Registrar scheduling 5 dates for hearing and parties subsequently agreeing to adjourn all but one - Parties advised that as result of their conduct in scheduling of this matter, Board unlikely to have further hearing dates available prior to March 1992

SEALY UPHOLSTERY CANADA INC. AND/OR PRICE WATERHOUSE LIMITED AND/OR WILLIAM STUART NATHANSON C.O.B. AS BRIGHTON FURNITURE AND/OR NOPANS VENTURES LTD. AND/OR 883727 ONTARIO INC.; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, TEAMSTERS UNION, LOCAL 847 1096

Sale of a Business - Bargaining Unit - Toronto General Hospital and Toronto Western Hospital merging into The Toronto Hospital in 1986 - ONA representing nurses in separate bargaining units at both locations - Hospital making application under section 63 and asking Board to declare that there should be only one full-time and only one part-time bargaining unit for both locations - Board satisfied that concerns raised by Hospital are matters to be addressed by the parties through bargaining, and not by the Board through an exercise of powers under section 63(6) of the *Act* - Application dismissed

TORONTO HOSPITAL, THE; RE O.N.A. 1098

Sale of a Business - Remedies - Painting company ceasing operations following, and as a result of, union's certification - Painting company's owner and "key man" subsequently hired to manage maintenance company's new painting division - Maintenance company thereby acquiring not only key man's expertise and reputation, but also painting company's "goodwill" and place on customer's bid list - Board finding sale of a business and declaring union to be bargaining agent for all employees of the maintenance company's painting division

GALLANT PAINTING, 715329 ONTARIO LTD., C.O.B. AS AND 615823 ONTARIO INC. C.O.B. AS LINDSAY MAINTENANCE SERVICES PAINTING DIVISION; RE P.A.T., LOCAL 1590 1051

Termination - Collective Agreement - Timeliness - Whether termination application timely - Board concluding that parties arrived at final resolution of collective agreement portion of matters in dispute between them on July 11 - Termination application filed on July 12,

VIII

within hours of news of the “settlement” having come to the plant, accordingly found to be untimely - Application dismissed	
DAVID CHAPMAN’S ICE CREAM LIMITED; RE TIMOTHY MCCARTHY; RE U.F.C.W, LOCAL 175/633	1030
Timeliness - Collective Agreement - Termination - Whether termination application timely - Board concluding that parties arrived at final resolution of collective agreement portion of matters in dispute between them on July 11 - Termination application filed on July 12, within hours of news of the “settlement” having come to the plant, accordingly found to be untimely - Application dismissed	
DAVID CHAPMAN’S ICE CREAM LIMITED; RE TIMOTHY MCCARTHY; RE U.F.C.W, LOCAL 175/633	1030
Timeliness - Construction Industry - Construction Industry Grievance - Practice and Procedure - Grievance filed in June regarding work assignment made in February - Company arguing that grievance untimely - Board exercising discretion under section 44(6) of the <i>Act</i> to extend time limits so that dispute at basis of the matter can be resolved	
CONSAMAR INC.; RE L.I.U.N.A.; RE PIPELINE CONTRACTORS ASSOCIATION OF CANADA; RE TEAMSTERS UNION, LOCALS 91, 141, 230, 879, 880, 990, 989	1021
Unfair Labour Practice - Adjournment - Practice and Procedure - Witness - Complainant alleging that witnesses summonsed by union in certification proceeding were disciplined because they were so summonsed - Company seeking adjournment due to unavailability of witness - Counsel for company giving various undertakings - Board directing that the action taken against the grievors by the company be cancelled and that copies of the Board’s decision be posted in the workplace - Adjournment granted	
GEORGIAN INDUSTRIES INC.; RE A.C.T.W.U.....	1067
Unfair Labour Practice - Related Employer - Board not persuaded that decision to implement new technology motivated by anti-union animus - Unfair labour practice complaint dismissed - Board viewing respondents’ operations as sufficiently distinct so as to permit, yet sufficiently related so as to warrant, application of related employer provisions of the <i>Act</i> - Mere fact that entities in question not legal or corporate entities not, of itself, precluding application of section 1(4) - Related employer declaration issuing	
METROLAND PRINTING, PUBLISHING & DISTRIBUTING AND THE MISSISSAUGA NEWS; RE G.C.I.U., LOCAL 500M; RE HARLEQUIN ENTERPRISES LIMITED THROUGH ITS DIVISIONS THE MISSISSAUGA NEWS AND METROLAND PRINTING, PUBLISHING AND DISTRIBUTING	1069
Witness - Adjournment - Practice and Procedure - Unfair Labour Practice - Complainant alleging that witnesses summonsed by union in certification proceeding were disciplined because they were so summonsed - Company seeking adjournment due to unavailability of witness - Counsel for company giving various undertakings - Board directing that the action taken against the grievors by the company be cancelled and that copies of the Board’s decision be posted in the workplace - Adjournment granted	
GEORGIAN INDUSTRIES INC.; RE A.C.T.W.U.....	1067

1049-91-G Labourers International Union of North America, Applicant v. **Consamar Inc.**, Respondent v. Pipeline Contractors Association of Canada, Intervener v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America on behalf of Locals 91, 141, 230, 879, 880, 990, 989, Intervener

Construction Industry - Construction Industry Grievance - Practice and Procedure - Timeliness - Grievance filed in June regarding work assignment made in February - Company arguing that grievance untimely - Board exercising discretion under section 44(6) of the Act to extend time limits so that dispute at basis of the matter can be resolved

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *S.B.D. Wahl* and *G. Flook* for the applicant; *Carl Peterson* for the respondent; *Mike McCreary*, *Issac Raymond* for Teamsters; *Barry Brown* for Pipe Line Contractors Association of Canada.

DECISION OF THE BOARD; September 10, 1991

1. This is the referral of a grievance to arbitration under section 124 of the Act. It concerns an allegation that the employer failed to implement an assignment of work relating to work as a swamper, or helper, on a field truck in violation of the National Pipeline Collective Agreement which binds the parties. There were two swampers on the job. The work on the first was awarded to the Labourers on January 29, 1991. The same type of work on a second truck is alleged by the applicant to have been awarded improperly to the Teamsters on February 11, 1991. When the matter came on for hearing, several preliminary matters were raised. The first portion of the hearing was involved with hearing argument on the order in which the matters should be heard. The preliminary matters were:

1. The status of the Teamsters as an intervener. The Teamsters sought standing for preliminary matters as well as the merits of the dispute, whether heard as an arbitration or a jurisdictional dispute.
2. The question of whether there should be deferral to the filing of a complaint under section 91 of the Act as the issue is characterized by the employer and the Teamsters as a jurisdictional dispute. Both these parties wished the matter to be dealt with as a jurisdictional dispute. Employer counsel advises the issue has been a contentious one for some time.
3. The timeliness of the grievance.
4. The Teamsters also took the position that the matter was inarbitrable as the Labourers and the Teamsters had agreed to an alternate dispute resolution process in certain policy documents which were not before the Board.

After hearing argument from all those present, without making a finding on the status of the Teamsters, we decided to hear the issue of the timeliness of the grievance first, as it was the only issue that had any potential for resolving the whole matter, which promised to be lengthy (one

counsel's estimate was 20 days of hearing) and potentially complex. The Teamsters waived participation in the argument on this issue, while preserving their argument that they have a right to intervene on the other aspects.

Timeliness Issue

2. The parties were able to agree on certain documents and stipulated facts as the factual basis for the argument of the timeliness issue. The following are the stipulated facts:

- a. The Labourers' International Union of North America ("the International") was not a party to the "original" proceedings relating to the issue in dispute. [This refers to OLRB File 3258-90-G, a referral under section 124 of a grievance related to the same work assignment by the Labourers' Ontario Provincial District Council ("the District Council") which was dismissed by a decision of the Board (differently constituted) on May 21, 1991. This decision is referred to below as the Surdykowski decision.]
- b. G. Flook, LIUNA International Representative, attended at the Ontario Labour Relations Board on the April 23, 1991, hearing day for one half hour at which time the issue of the competence of the Labourers' District Council to forward the grievance to arbitration was introduced at the behest of the Teamsters.
- c. The decision of the Board of May 21, 1991 was not sent to LIUNA by the Ontario Labour Relations Board.
- d. G. Flook, LIUNA International Representative, attended the LIUNA Ontario Provincial District Council delegates meeting of June 13, 1991. At this meeting he heard that a decision had been rendered in the prior OLRB proceeding and requested a copy. A copy was provided to Mr. Flook by fax from the District Council on June 14, 1991. Flook referred the matter to the attention of E. Mancinelli, LIUNA Sub-Regional Manager, by placing it on his desk on June 14, 1991. Mr. Mancinelli was out of the office at the time. Mancinelli instructed Koskie and Minsky to issue the June 19, letter on June 18, 1991.
- e. The second field truck swamper remained on the job until mid April, 1991 and the last man on the job was April 27, 1991.

3. The documents agreed on are as follows:

- a. The grievance letter dated June 19, 1991 as follows:

We wish to inform you that we have been retained by the Labourers International Union of North America on its own behalf and on behalf of its Local Unions 491, 493 and 607 and their unemployed members (hereinafter collectively referred to as "the Union") with respect to the grievance initially filed by the Labourers International Union of North America, Ontario Provincial District Council dated March 6, 1991.

If necessary, on behalf of our client, we hereby adopt, reactivate and/or refile the grievance letter dated March 6, 1991 referred to above, a copy of which is attached.

On January 29, 1991, Consamar Inc. awarded the jurisdiction of the fuel truck swamper to the Labourers International Union of North America. This award was confirmed by letter dated February 15, 1991 (a copy attached). We also include a copy of a letter dated February 18, 1991 from the Labourers' Ontario Provincial District Council which brought this matter to your attention in writing and upon which we shall rely.

Accordingly, the Union grieves that from on or about February 11, 1991 and continuing to date, the Employer has violated the operative Labourers' Mainline Pipe Line Agreement for Canada by failing or refusing to employ only members in good standing of the Union for all work covered by the Collective Agreement and specifically the work of the fuel truck swamper being general labourers' work assisting the fuel truck driver at its northern Ontario pipeline job sites contrary to the Collective Agreement, and, without limiting the generality of the foregoing, Articles I, II, III, IV and V thereof.

At all material times there have been and continue to be unemployed members of the Union who are qualified, ready, willing and able to perform the said work for the Employer.

RELIEF REQUESTED

1. A Declaration that the Collective Agreement is binding upon Consamar Inc.
2. A Declaration that the Collective Agreement has been violated by the Employer as hereinbefore set forth.
3. An Order that the Employer employ only members in good standing of the Union for all work covered by the Collective Agreement including all work of the fuel truck swamper being general labourer's work assisting the fuel truck driver at its Northern Ontario Pipeline job sites.
4. An Order of Damages against the Employer in an amount equal to all wages, benefits, contributions, deductions and allowances or remittances pursuant to the Collective Agreement with interest pursuant to the Collective Agreement and at Law.
5. Such further and other relief as may be appropriate in the circumstances.

We wish to inform you that we have been instructed to refer this matter to arbitration before the Ontario Labour Relations Board pursuant to Section 124 of the *Labour Relations Act*, R.S.O. 1980 c. 228 as amended.

- b. A letter dated February 15, 1991 to Larry McDonald, International Representative of the Teamsters, from Consamar Inc. which was copied to Flook of LIUNA, confirming the work assignment of the first swamper to the Labourers'.
- c. A letter of February 18, 1991 to Consamar Inc. from the Ontario District Council on which Flook was again copied as follows:

At the prejob markup meeting held on December 3rd, 1990, in North Bay, you awarded the fuel truck swamper to the Labourers' Union which is in accordance with our collective agreement and the area practice throughout Ontario, since we first signed collective agreements with the Pipeline Association.

I was informed by Local 491 on the evening of February 13th that the Teamsters were claiming this work, also that the Superintendent on the project was confused and was awaiting instructions from your office.

I called your office at approximately 9:40 a.m. on February 14th, 1991, you confirmed

that the work was rightfully assigned to the Labourers' Union and you had no intention of changing the original assignment made to our Union at the prejob meeting held in North Bay and further when the work commenced on the project on or about January 29th, 1991. This was further confirmed by your letter of February 15th, 1991, to the Teamsters Union.

I sincerely hope that you will continue to assign this work to the Labourers' Union. Any deviation will result in a violation of the Collective Agreement and the betrayal of our trust and will leave us no choice but to take whatever action is necessary to obtain damages or otherwise rectify this matter forthwith.

- d. The March 6, 1991 grievance brought by the LIUNA District Council which was dismissed by the Surdykowski panel. This was copied to Mancinelli of LIUNA. It clearly concerns the same work assignment as the June 19 grievance before us.

4. Also admitted, over the objection of Mr. Wahl to the effect that it was irrelevant, was a February 19, 1991 letter from Consamar Inc. to Flook confirming the assignment of the second swamper to the Teamsters, and giving its reasoning for so doing.

5. Other documents referred to were the Board's covering letters enclosing the decision of May 21 and an amendment thereto which were addressed to a number of people, not including the International, and no reference to the International was made in them.

6. The company argues the timeliness objection in three parts. Firstly, it says the time limits are mandatory. Even under section 124, they are a threshold which must be met. The company submits that the matter was clearly out of time, whether you pick February 11th or 19th as the operative date of the assignment. There was no grievance filed by 60 days from the later of those dates, which would have been April 19, 1991. This is argued to be in violation of the time limits in Article XV of the collective agreement, which reads as follows:

GRIEVANCE PROCEDURE

A. Where a difference arises between the Employer and the Union or a Local Union relating to the interpretation, application or administration this Agreement or where an allegation is made that discharge of an employee is unjust or that the Agreement has been otherwise violated, the difference of opinion of dispute, including any question as to whether a matter is arbitrable, shall be resolved without stoppage of work in the following manner.

B. The Job Steward or Business Manager of the Local Union shall attempt to resolve the difference on the job with the Foreman or Superintendent of the Employer.

C. If the difference is not resolved within forty-eight (48) hours of the occurrence, the aggrieved party shall submit the difference and the remedy sought in writing to the Executive Secretary of the Association and the International Representative of the Union within sixty (60) days of occurrence, or in the case of alleged unjust discharge, within ten (10) days of occurrence. Failure to submit the difference in writing within the specified time periods shall result in the matter being deemed to be waived. The foregoing time limitations shall not apply where there has been failure or refusal to remit employer contributions or deductions from employees as provided for in this Agreement.

The company argues, relying on *Ontario Hydro*, [1987] OLRB Rep. Apr. 574, that the interpretation that should be put on the first three words of section 124 is that they refer to the ability to expedite the matter despite a lengthier grievance procedure, not the ability to ignore the time limits in the collective agreement. Reference was also made to *Hurlenco Limited*, [1981] OLRB Rep. June 683 where the analysis was done under 44(6) in the presence of an issue similar to that in

Ontario Hydro, supra. He asks us to interpret the decision of the Board in *The Lummus Company Canada*, [1976] OLRB Rep. Jan. 980 in the same light and to do it all in the context of the purpose of section 124 which is expedition. The swamper work was assigned in January and the job was finished in April. Counsel asked us to find as the Board did in *Ontario Hydro* that there is nothing inconsistent with the purpose of expedition in finding that the parties are confined by mandatory time limits. Rather they dovetail and are complementary. Unlike the union in *Ontario Hydro, supra*, the International definitely knew of the matter here.

7. Secondly, the company argues, in the alternative, if the Board finds that section 124 gives the Board jurisdiction to ignore the time limits in the collective agreement, there was still undue delay and the grievance should be dismissed on the basis of delay, given the context of the construction industry. The delay here is simply too long, no matter how the matter is characterized.

8. Thirdly, anticipating the union's argument under section 44(6) of the *Act*, the union has to show that it had reasonable grounds for missing the time limits and has not done so. The employer did not argue prejudice, but argues that the jurisprudence is clear that even if there is no prejudice the union must show reasonable grounds for the extension. Counsel says this case is analogous to *Re Tend-R-Fresh Plant*, 13 L.A.C. (3d) 90, where the union had launched a grievance and processed it through the regular grievance procedure and then made a section 45 application. The Ministry refused to process it because it was untimely. The union then tried to go the regular route under the collective agreement but the grievance was then out of time. The grievance was not allowed to proceed under section 44(6). Counsel also referred to cases referred to in that decision, including *Toronto East General Orthopaedic Hospital Inc.*, 28 L.A.C. (2d) 74. The company did not lull the union into a false sense of security. There was no confusion, no lack of knowledge. The company says that the cases are well established that the case crystallizes on the day of the assignment, which was February 19. Therefore the delay is approximately 90 days even if one accepts the explanation given for May and June. We are asked to conclude there are simply no reasonable grounds in this case.

9. Furthermore, this is not a continuing grievance like in *Ontario Hydro, supra*. Counsel cited *Re United Glass Workers and Dominion Glass*, [1973] O.R. (2d) 408, for the proposition that the mere fact that the effects continue is not enough to make something a continuing grievance. Counsel also argued that the retro-activity on a matter such as this would be limited to the time limit for filing a grievance under the collective agreement. Here, he says there would be no damages within those time limits because the swamper was gone more than 60 days before the grievance was filed.

10. Union counsel asked us to look at the *Ontario Hydro, supra*, decision in a different light than employer counsel suggests. He said perhaps the distinction drawn by the Board in that case between a dispute and a grievance can be sustained on the basis that there is a difference in the nature of the grievance procedures between the collective agreement in the *Ontario Hydro, supra*, decision and the one at issue here, the National Pipeline Agreement. A dispute had no status as a grievance until after the preliminary discussion in the collective agreement considered in *Ontario Hydro*. There is no such distinction in the Pipeline Agreement; there is no difference in status between what is a "difference" and that which is submitted in writing. Therefore he argues that the distinction in *Ontario Hydro* should not be applied in this case.

11. Mr. Wahl suggests that section C of the grievance procedure set out above, which contains the 60 day time limit, is satisfied by the wording of the letter of March 6, 1991 which was filed in a timely manner. It went to arbitration and the parties appeared at the Board on April 23, 1991

to deal with it. Mr. Flook was there for half an hour and lent support to the District Council's grievance. Counsel argues that from an agency point of view there is a valid grievance on behalf of the International, particularly since it was copied on the grievance. The decision of the Surdykowski panel dealt with the capacity to refer the grievance. Mr. Wahl says that the issue argued was that only a party to the collective agreement had the power to refer the grievance to arbitration and not whether the March 6 letter was a grievance. In his view everything else in the decision is obiter. He also said there is a distinction to be made between dismissing the proceedings and dismissing the grievance. Insofar as the Surdykowski decision dismisses the grievance, counsel asserts it was without benefit of the argument of counsel in that respect and therefore should not be followed.

12. In the alternative Mr. Wahl argues, should the Board find that the March 6th grievance is not before us, the June 19th letter clearly makes reference to the March 6, 1991 letter.

13. After April 23, 1991, the union argues that the whole matter was *sub judice*, in the process of being tried by the Board. He says that to suggest that the union was negligent by inaction when the matter was under consideration by the Board is preposterous.

14. As well, union counsel submits that the matter is an all fours with *The Lummus Company Canada, supra*, that there is a separate grievance arbitration process under the *Labour Relations Act*. Once it is resorted to, the proceedings under the operative collective agreement are vacated. Therefore, the time limits in the collective agreement are not applicable to this matter due to the opening words of section 124.

15. Further the union argues that the matter is a continuing grievance as mentioned in both the letters of June 19 and March 6. The union reads *Dominion Glass, supra*, differently than the employer does. It says that all the case decided is that the Board of arbitration had given the collective agreement an interpretation it could reasonably bear and therefore the court ought not to interfere. Mr. Wahl refers to page 410 of the decision for a support for the idea that it was a continuing grievance, as well as *Port Colborne General Hospital and O.N.A., (1986) 23 L.A.C. (3d) 323*. The union submits that each day a teamster performed the swamper work, the matter constituted a new violation. They say not only is *Dominion Glass* to be read carefully but section 44(6) was enacted after that decision and invites a different conclusion.

16. After the hearing Mr. Wahl mailed the Board a decision of the Nova Scotia Supreme Court, Appeal Division in *Re United Brotherhood of Carpenters and Yorkdale Drywall Ltd., (1987) 40 D.L.R. (4th) 357*. The case finds that the time limit for filing a grievance did not affect the measure of compensation.

17. In any event, the union argues, section 44(6) should be used to extend the time limits to make the June 19, 1991 grievance timely. Counsel referred to *Becker Milk (1978) 19 L.A.C. (2d) 217*, for the criteria that should be looked at. These are: reason for delay, the length of delay and the nature of the grievance. He says this is not comparable to *Tend-R-Fresh, supra*, which was a question of election of forum and therefore not comparable to the facts of this case. He refers to *Re Algoma Contractors Ltd. and USW, (1980) 25 L.A.C. (2d) 292* as support for the request to extend the time limits as the arbitration board found the fact was an ongoing problem between the parties to be a reason to extend time limits under section 44(6).

18. The union submits that the length of delay should be counted from June 13, 1991, some five days before the grievance was filed which included a weekend. Once Mr. Flook learned on June 13th that the Board's decision had been released he acted with great dispatch and the grievance was issued very shortly after that. Once the matter is no longer *sub judice* the union acts

immediately. He said that this case was comparable to *Falconbridge Nickel Mines*, (1981) 1 L.A.C. (3d) 158 because in that case the union was allowed to make use of section 44(6) because of the evolving jurisprudence with parties who were a stranger to their collective agreement. Here it is a matter of evolving jurisprudence directly related to the collective agreement in issue - all the more reason to exercise the discretion under section 44(6). An additional consideration is that damages have stopped running as the job is finished.

19. Counsel also relied on *Aimco Industries*, (1974) 12 L.A.C. 258 which applied section 37(5a) [now 44(6)] to relieve against time limits for the initiation of the grievance. The union says that the fact that the work is over does not take away from the fact that within approximately 60 days of June 19th the work was being performed by an employee outside the bargaining unit.

20. As well the company did not object to the timeliness at the outset of the grievance procedure as it should have done. In support for this counsel refers to *Falconbridge Nickel*, *supra*, and asks that we find the company has waived this objection.

21. Employer counsel says in reply that this is mainly an attempt to re-argue the Surdykowski decision. The Surdykowski panel's decision disposed of the March 6, 1991 grievance as follows, in paragraph 26 of its May 21, 1991 decision:

We are satisfied that the applicant Labourers' International Union of North America, Ontario Provincial District Council is not a party to the Pipeline Agreement and therefore has no status to either bring the grievance herein or refer it to the Board. The grievance is therefore dismissed.

He strenuously objects to the characterization of the District Council acting as agent for the International. He submits that the Surdykowski decision was clear that there are two separate entities and that the District Council is not a party to the collective agreement. Because of that fact the District Council could not bring the grievance and could not have referred it. Therefore the March 6th letter is not a grievance. Since it is not a grievance, Mr. Peterson argues that we must consider the situation as there being nothing at all between the assignment of the work and June 19th. The March 6th grievance simply had no status.

22. Mr. Peterson says that the sub judice argument has no foundation in law and that the distinction between the situation and the wording in *Ontario Hydro*, *supra*, is not one we should act on. He finds that the Pipeline agreement follows the pattern in the Hydro collective agreement quite closely. He suggests that *The Lummus Company Canada*, *supra*, decision was quite rightly distinguished by the Board in *Ontario Hydro* and that the issue in *Ontario Hydro* and the issue here today is not the same as the issue in *The Lummus Company Canada*. He says *Ontario Hydro* stands for the proposition that time limits should be binding especially in the construction industry, and that is what we should follow.

23. As to the nature of the grievance, counsel does not agree it is continuing and feels that if discharges are the ones for which the most leeway should be given, this kind of grievance is far down the spectrum and little, if any, leeway should be given. As to *Dominion Glass*, *supra*, employer counsel points to page 411 where the Court said a work assignment grievance was not a continuing grievance. There is no evidence that legal counsel was to take care of the matter or that they were waiting for a decision like in *Falconbridge*, *supra*. Counsel submits the latest date after which they should have grieved was April 22nd, when the International was told that the earlier grievance would be argued on the basis of no status for the District Council. There is no explanation for their failure to grieve after that. Counsel suggests that the fact there are no damages should impact on our discretion when we consider the nature of the grievance.

24. Should the timeliness objection lead to the dismissal of this grievance? The union submits the employer has waived its right to make the objection by not doing so earlier. Although it may be true that the company should have raised the timeliness objection earlier, we do not have sufficient factual basis before us to find either waiver or estoppel. No evidence was called on this and none of the agreed facts speaks to this aspect of the case. Therefore we will consider the various aspects of the employer's objection. Firstly, we observe that the employer's characterization of the time limits as mandatory was not disputed by the union.

25. We are of the view that is unnecessary to decide whether the matter is a continuing grievance or not. Whether considered as continuing or not, the matter is still untimely under the collective agreement, as the disputed work was finished in mid-April, more than sixty days before the grievance was filed. We say this having considered Mr. Wahl's argument that the March 6 grievance is still before us. The Surdykowski decision clearly dismissed that grievance, which was brought by a different party than the International. Reconsideration of that decision was not sought. Therefore, we consider this grievance to be a different grievance, brought by a separate party and not the same as the March 6 grievance. Nor do we find any merit in the agency argument made by Mr. Wahl on the facts before us.

26. We are therefore left with two questions - whether the time limits are applicable given the wording of section 124 and whether there are reasonable grounds to extend the time limits for filing the grievance pursuant to section 44(6).

27. On the question of the applicability of the time limits of the collective agreement, argument was addressed to the meaning of the wording at the opening of section 124(1) "notwithstanding the grievance and arbitration provisions in a collective agreement", focussing on the proper interpretation and potential conflict between the Board's decisions in *Ontario Hydro* and *The Lummus Company Canada, supra*. In the final analysis, given our view of the application of section 44(6) to this matter, it is unnecessary to decide this facet of the argument.

28. Section 44(6) of the Act reads as follows:

44.-
...

(6) Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

It is made applicable to construction industry grievances by section 124(3). The collective agreement in question does not make section 44(6) inapplicable. No prejudice to the employer was argued, so the only question to be answered is whether there are reasonable grounds to extend the time limits.

29. We have looked at the criteria from *Becker Milk, supra*, in turn. We have taken the approach that all the factors should be weighed as an interrelated group to determine whether as a whole, there are reasonable grounds to extend the time limits. See *Greater Niagara General Hospital, supra*.

30. The reason for the delay here is most easily described as a mistake as to who the proper grieving party should have been. Although that mistake itself is largely unexplained, once made, the International's waiting for the outcome of the Board's decision is plausible, if not the most pru-

dent course of action. We do not think this conduct was unreasonable. Although this does not, on the other hand, make for reasonable grounds to extend the time limits in and of itself, we do not think it is a bar to the granting of section 44(6) relief given the other circumstances of the case. As well, we have weighed heavily the fact that the period of delay was taken up with action on this issue which involved the employer and the International peripherally. There could have been no mistake in the employer's mind as to whether the matter was a live issue or whether the International was concerned about the matter. This is not the situation of *Hurlenco*, *supra*, where no reasons whatsoever were given for the inaction.

31. The length of the delay is a matter of significant concern, particularly given the construction industry and the desire for expedition which is at the root of the reason for the existence of the expedited arbitration process in the construction industry. See *The Lummus Company Canada* and *Ontario Hydro*, *supra*, for a discussion of the Waisberg Report and the rationale for the provisions. We have considered the employer's point that the delay is excessive in the construction industry, and that the grievance should be dismissed for this reason alone. Given the other considerations in this matter we do not find the length of delay warrants dismissal of the grievance. Given the Surdykowski decision, technically nothing existed between February 19 and June 19 and thus the delay can be measured as 60 days beyond that allowed by the collective agreement. However, as the period of delay was actually experienced, the time lost to the International's delay is more realistically measured from the date of the earlier grievance, March 6, to that of the International's grievance, June 19. In the final analysis, we are of the view that this amount of delay can appropriately be dealt with in considering what, if any, remedy is owing the International if the grievance is ultimately successful. We note that the issue of the effect of section 124 on the time limits arose and was resolved in *Ontario Hydro*, *supra*, in the context of the effect of delay on the Board's exercise of its remedial power. Further, we are of the view that it does not follow, as argued by the employer, that the matter should not be heard, if no monetary damages would flow for the period of delay. There may be other remedies, or value in a declaration alone, where a labour relations problem would otherwise continue to irritate the relationship between the parties. In any event, we specifically decline to consider at this point what effect any delay would have on such remedy.

32. On the question of the nature of the grievance, it was clear from all the circumstances of the case, that this is a matter that is of larger concern to the parties than this one finished piece of work. It involves the nature of the assignment process as well as the competing interests of the two unions. This type of consideration alone was enough to warrant extension of the time limits in *Re Algoma Contractors*, *supra*, and was one of the deciding factors in cases such as *Greater Niagara General Hospital*, 1 L.A.C. (3d) 1 and *Falconbridge Nickel*, *supra*.

33. As well it is a grievance in which there can be honest debate about whether the matter is a continuing grievance, especially if one takes into account the aspect of the grievance concerning dues and other remittances payable over the period in question. See in this regard *Re Port Colborne General Hospital v. O.N.A.*, *supra*, and the cases cited therein. If it were to be considered a continuing grievance, the amount of time that the grievance was out of time beyond the time limits in the collective agreement is a matter of a few days.

34. Although there is a theoretical analogy between *Tend-R-Fresh*, *supra*, and the facts of our case, there is also an important difference. The grievance which the Board of arbitration was considering in that case was the very same grievance in which it found an election had been made for the expedited procedure. Here we are dealing with a fresh grievance from another party, and not an attempt by the District Council to revive the March 6 grievance. We are not persuaded that we should adopt the reasoning in *Tender-R-Fresh* as determinative in this matter.

35. When looked at as a whole, the above factors persuade us that there are reasonable grounds to extend the time limits so that the dispute at the basis of this matter can be resolved. In summary, the cause for the delay was not unreasonable, the length of the delay is such that it can be dealt with, if necessary, as a remedial matter, and the nature of the grievance is such that it will likely benefit the relationship between the parties to have it resolved.

36. This panel is not seized of the matter. It is referred to the Registrar for rescheduling to deal with the other preliminary matters and the merits, if necessary.

1330-91-R Timothy McCarthy, Applicant v. United Food and Commercial Workers International Union, Local 175/633, Respondent v. David Chapman's Ice Cream Limited, Intervener

Collective Agreement - Termination - Timeliness - Whether termination application timely - Board concluding that parties arrived at final resolution of collective agreement portion of matters in dispute between them on July 11 - Termination application filed on July 12, within hours of news of the "settlement" having come to the plant, accordingly found to be untimely - Application dismissed

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *R. M. Sloan* and *E. G. Theobald*.

APPEARANCES: *Tim McCarthy*, *Vern Scott* and *Tod McAdam* for the applicant; *Michael A. Church*, *Richard Woodruff*, *Kevin Ward* and *David Patton* for the respondent; *William R. Watson* and *M. Lisa Kirby* for the intervener.

DECISION OF THE BOARD; September 18, 1991

1. This is an application for termination pursuant to the provisions of section 57(1) of the *Labour Relations Act*. That section provides:

57.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

In the circumstances that will be outlined below, the respondent trade union submits that the parties *were* able to reach a collective agreement prior to the time that the termination application was filed, and that the termination application is accordingly untimely.

2. There is a long and not particularly happy history to this matter, the details of which it would serve the parties little to go into. After lengthy proceedings over the latter part of 1989 and early 1990, by decision dated June 26, 1990 the Board found the employer's intervention in the union's attempts to organize the work force to be unlawful and on such a scale as to warrant "out-right" certification under the provisions of section 8 of the Act. That decision of course required a finding only that the union had "support adequate for collective bargaining", and a final resolution of the composition of the bargaining unit was referred at that point to the parties, together with a Labour Relations Officer of the Board. That, of course, raises an issue as to when the "year" for the union to obtain a collective agreement begins to run (see, e.g., *Comstock Funeral Home Ltd.*,

[1982] OLRB Rep. Oct. 1436), but in light of the view we take of this matter generally, such issue need not be decided.

3. Subsequent to that decision certifying the union in June of 1990, bargaining for a collective agreement continued through 1990 into 1991, as did, from the union's point of view, the employer's unfair labour practices. By the end of May, 1991, the parties had before them an application for first-contract application brought by the union under section 40a, numerous unfair labour practice complaints brought by the union, and an unfair labour practice brought by the employer against the union. The employer also had retained (some months earlier) new counsel, Mr. William Watson of the law firm Baker and Mackenzie. Meetings had been set up to attempt further negotiations, but Mr. Watson had to request an adjournment until the latter part of June because of a commitment to represent Canadian employers at the ILO Conference in Geneva. Mr. Church, acting as counsel to the Union, raised with Mr. Watson the issue of further delay and the prospect of a termination application, but was comfortable with assurances from Mr. Watson that there appeared to be nothing of that nature in the offing. Mr. Church accordingly agreed to await the return of Mr. Watson.

4. Negotiations did in fact resume on Mr. Watson's first day back in the office, June 26th, and for the first time progress began to be made between the parties. The parties met again on July 11th, and with the assistance of Mr. Bowman, a Labour Relations Officer assigned to the case by the Board, came to an agreement with respect to *all* of the terms of a first collective agreement. In return the Union of course gave its undertaking to withdraw the section 40a application that was before the Board. The parties also tried to address the section 89 complaints outstanding between them, and all of that was reflected in a Memorandum of Settlement being drafted between them around midnight of July 11th, and signed shortly thereafter in the early hours of the 12th. The Memorandum begins with the following recitation:

The terms of the Collective Agreement between David Chapman's Ice Cream Limited and UFCW, Local 175 shall be as follows:

All items, except those specific amendments noted below, shall be as set forth in the Employer's Schedule H to its Reply to the application under section 40a *OLRA*.

The following amendments shall apply:

There then follows 18 pages of the parties' final agreed-upon changes to the positions they had arrived at previously, in typical format, beginning:

2.02(a) after the word "regular" add the words "... initiation fees and ..."

Article 10 - delete article 10.01 (all other provisions will therefore be renumbered as appropriate)

[etc.]

At the end of those collective-agreement terms is then a section entitled "Other Commitments", which reads:

Other Commitments:

- The Union Committee agrees to unanimously recommend the ratification of this Collective Agreement;
- The union agrees to hold a ratification vote on this Collective Agreement;

- The Union agrees to withdraw the section 40a application filed in this matter;
- The Union agrees to meet with the Company and resolve all outstanding section 89 complaints filed as at the date hereof;
- The Company agrees to provide a letter to the Union outside the Collective Agreement confirming the fact that the Parties will meet to discuss the issues of drivers run sheets and production shift hours during winter months; and,
- The Company Committee will unanimously recommend the ratification of this Collective Agreement.

While this Memorandum setting out the agreed-upon terms was being pulled together, Kevin Ward, the leading employee member of the union's bargaining committee, was authorized to return to the plant (still on the 11th), and post a notice announcing the achievement of a tentative collective agreement. That collective agreement was in fact taken to a meeting of employees on July 13th, and ratified (as confirmed to the employer).

5. There then remained the matter of the outstanding unfair labour practice complaints, and a meeting to further attempt to resolve them was scheduled for and took place on July 17th. On July 12th, however, the present application for a declaration terminating bargaining rights, without any "petitions" or statements of employee wishes, had been sent to the Board by registered mail. The Board received that application on July 16th, and the Board's Officer, in response to a standing request from Mr. Watson to let him know if and when any termination application was filed in this matter, advised Mr. Watson of that fact. That meeting with the parties did not succeed in resolving all of the unfair labour practice complaints, and it was agreed that Mr. Bowman would meet further with the parties on July 23rd and 24th in Owen Sound, the days that had been set aside by the Board to commence hearing the matters. At those meetings Mr. Bowman made it clear to both counsel present that the Board was in receipt of the present application. Once again negotiations for the resolution of the many outstanding unfair labour practice complaints were protracted, but at the end of the two days all of them had been resolved, subject on one of them to a clarification being sought from the Unemployment Insurance Commission with respect to the position of that grievor. That overall Agreement drawn up and signed on July 24th was headed:

WHEREAS, the Union filed various unfair labour practice complaints against the Employer - Board File Nos. 2648-90-U, 2785-90-U, 2873-90-U, 3364-90-U, 0442-91-U, 0721-91-U, 0722-91-U, 0720-91-U and 0723-91-U;

AND WHEREAS the Union filed an application or a direction for first contract arbitration - Board File No. 0606-91-FC;

AND WHEREAS the Employer filed an unfair labour practice complaint against the Union - Board File No. 0364-91-U;

AND WHEREAS the parties have settled their collective agreement and wish to resolve those various other matters without prejudice to their respective positions and on a without precedent basis;

NOW THEREFORE the Union and the Employer have agreed as follows:

[emphasis added]

One of the items insisted upon by Mr. Watson to be specifically evidenced in the document was, as with the section 89 complaints, the express withdrawal of the first-contract application, and that was contained in Item #7 of the Agreement, stating:

The Union withdraws its complaint in Board File Nos. 2648-90-U and 0723-91-U and withdraws its application in Board File No. 0606-91-FC.

The aforesaid clarification from the Unemployment Insurance Commission was in fact obtained subsequently, and that remaining section 89 complaint signed off on the morning of the hearing of the present application, prior to the Board convening.

6. The applicant's submissions in response to the Union's preliminary objection were brief. Mr. McCarthy was accompanied at the hearing only by two other employees, and stated simply that the previous vote taken by the employees was to decide only whether they wanted the proposed collective agreement or wanted a strike; now what the employees were asking for was the chance to vote on whether or not they wanted the Union *at all*.

7. The employer's submissions, to the stated consternation of the Union, were considerably more comprehensive, essentially asserting the position that no collective agreement had ever been reached by the parties, since two of the elements integral to it, the actual withdrawal of the first-contract application, and the resolution of the outstanding section 89 complaints between the parties, did not occur until July 24th at the earliest. The Board does not agree. Obviously, the resolution of unfair labour practice complaints or any other piece of litigation does not form part of the actual text of a collective agreement, which is a document setting out the terms and conditions which will govern the employment relationship at the workplace. That is not to say, as we know, that settlement of other such forms of litigation outstanding between two collective-bargaining parties cannot, if the parties so choose, be made conditions prior to which any collective agreement between the parties will be entered into. But it has to be determined by the parties' express language whether it is in fact such "linkage" that has been agreed to. And we do not find that to be the case here. Rather, it is quite realistic on all of the present facts to suggest, as Mr. Church does, that the parties:

- (a) reached agreement on all of the terms necessary to allow them to conclude their first collective agreement; and
- (b) wishing to continue in the same spirit, evidenced a good-faith commitment to meet further to deal with the matter of the various pieces of potential litigation still outstanding before them.

Were the two not seen to be separate, there would have been little point authorizing Mr. Ward to post the announcement to the employees that he did on July 11th, nor place the terms of the "collective agreement" before the employees for their ratification on July 13th. All of that would have been manifestly premature, had the parties really been of the view that in fact no "collective agreement" had been arrived at until the employer had made an offer to the Union that was acceptable on each and every one of the section 89 complaints that still remained to be dealt with by the parties. Rather, as far as the collective agreement itself was concerned, we find it more consistent with both the language and the conduct of the parties that they were of the belief that a "deal" had been reached on July 11th, and that that deal opened the way to resolution of the various other pieces of litigation standing before the parties. The withdrawal of the section 40a application was, obviously, nothing more than a formality, since the Union's acceptance of all of the terms of a first collective agreement, as witnessed by the July 11th Memorandum (together with the Union's express agreement therein that, in return, the application under section 40a before the Board would be withdrawn), obviously would have rendered moot any section 40a application that the Union, without more, might for some reason have attempted to proceed with.

8. It is the conclusion of the Board, therefore, that the parties *did* arrive on July 11th at a

final resolution of the collective-agreement portion of the matters in dispute between them, and the present termination application, filed within hours of news of the "settlement" having come to the plant, we accordingly find to be untimely. Compare *Sears Canada Inc.*, [1986] OLRB Rep. Aug. 1159, and the cases cited therein.

9. The application is accordingly dismissed.
-

3312-90-R Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Donia Aluminum & Roofing Ltd., Respondent

Bargaining Unit - Certification - Construction Industry - Union seeking unit of carpenters engaged in installation of exterior cladding systems - Board hearing nothing which would cause it to depart from its usual practice that in a construction industry certification application a craft union must seek to represent all members of its craft employed by the employer - Board declining to grant union's request to describe unit by including words "engaged in the installation of exterior cladding systems"

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

APPEARANCES: *J. David Watson* and *Joe Almeida* for the applicant; *M. E. Geiger*, *Domenic Donia* and *Ross Donia* for the respondent; *Caroline Rowan* for Robert Shewell.

DECISION OF THE BOARD; September 9, 1991

1. This application for certification was scheduled for hearing before the Board on September 4, 1991. At that time the Board heard the representations and submissions of the applicant and the respondent with respect to certain issues arising from this application. Although previously named as interveners in this application, we note that the Canadian Shinglers Association did not seek to intervene in this application for certification. Ms. Rowan and Mr. Shewell who were present throughout the hearing indicated that the Canadian Shinglers Association was not seeking to establish trade union status and was not asserting that it had any agreement with the respondent which would bar the applicant. Mr. Shewell was present throughout because he had been subpoenaed to attend as a witness and Ms. Rowan appeared as his counsel in this regard. Neither Ms. Rowan, Mr. Shewell, nor any representative of the Canadian Shinglers Association made any submissions in respect of any of the matters addressed by the parties before the Board at the hearing on September 4, 1991.

2. After hearing the submissions of the parties the Board rendered the following oral ruling:

The Board has heard the positions of the parties with respect whether there is or is not a community of interest between persons engaged by the respondent as "shinglers/roofers" and persons engaged as "siders" - that is persons engaged in the installation of exterior cladding systems.

The representations of the parties with respect to this issue was necessitated because of their disagreement with respect to the bargaining unit description.

The applicant seeks to be certified for a unit consisting of:

all carpenters and carpenter's apprentices employed by the respondent engaged in the installation of exterior cladding systems in all sectors of the construction industry except the industrial, commercial and institutional sector, in Board area 8, save and except non-working foremen and persons above the rank of non-working foreman.

For purposes of clarity the installation of exterior cladding systems includes siding, soffit, fascia and eavestroughing.

The employer describes the appropriate bargaining unit as:

all carpenters and carpenters' apprentices employed by the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector, in Board Area 8, save and except non-working foremen and persons above the rank of non-working foreman.

The applicant's position is that the "community of interest" issue together with an issue in respect of the employment status of certain individuals (namely whether persons are independent contractors, dependent contractors or employees of the respondent) should be dealt with by way of officer examination and report to the Board.

The respondent submitted *inter alia* that the community of interest and bargaining issue be determined by the Board.

Nothing which we have heard today with respect to the evidence which each party has indicated it will adduce with respect to this "community of interest" issue would cause us to depart from our usual practice that in an application brought pursuant to the construction industry provisions of the Act, a craft union such as the applicant must seek to represent all members of its craft employed by the respondent. As a result we find it inappropriate to grant the request to appoint an officer with respect to that issue. We find it inappropriate to grant the applicant's request to describe the bargaining unit by including the words "engaged in the installation of exterior cladding systems" or the clarity note with respect thereto.

Having regard to the further representations of the applicant we find the appropriate bargaining unit in this instance to consist of all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in all the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

We do not propose to hold this matter in abeyance pending a decision of the Board in what was referred to as the *Mannville* case.

We hereby appoint an officer to meet with the parties in respect of the list of employees and to conduct the usual inquiries and examinations and report to the Board on the employment status of the persons characterized by the respondent as being independent contractors but whom the applicant asserts are employees and/or dependent contractors within the meaning of the Act.

1321-89-JD Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 837, Complainant v. **Ellis-Don Limited** and Greenspoon Bros. Limited and The Metropolitan Toronto Demolition Contractors Inc. and International Union of Operating Engineers, Local 793, Respondents

Construction Industry - Jurisdictional Dispute - Sub-contractor using Labourers to operate certain heavy machinery - Operating Engineers grieving against general contractor and asking it to only employ sub-contractors in contractual relations with it to perform work as set out in collective agreement - Operating Engineers suggesting to sub-contractor that collective agreement be signed and that Operating Engineers run the heavy equipment - Board earlier deferring s.124 application and Labourers filing jurisdictional complaint - Preliminary issue as to whether Board has jurisdiction under s.91 of the *Act* to hear complaint - Board concluding that demand for work was made "of the employer" within meaning of s.91 - Demand for work need not be unequivocal in nature - Board satisfied that it has jurisdiction to entertain complaint

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *J. Trim* and *R. R. Montague*.

DECISION OF THE BOARD; September 3, 1991

1. This is a complaint filed under section 91 of the *Labour Relations Act*, in which the complainants request that the Board issue a direction with respect to the assignment of certain work.
2. This decision deals with the preliminary objection raised by the respondent Operating Engineers, Local 793, that the Board has no jurisdiction to entertain the complaint, in that Local 793 was not requiring the employer to assign particular work to it. It is not disputed that in order for the Board to have jurisdiction, we must be satisfied that Local 793 "... was or is requiring an employer ... to assign particular work to persons in a particular trade union, or in a particular trade, craft or class rather than to persons in another trade union or another trade, craft or class..."
3. Ellis-Don Limited is the general contractor for a construction project involving the demolition of an Eaton's Department store in Hamilton, Ontario, and the construction of a new building on site. Ellis-Don subcontracted to Greenspoon Bros. Limited ("Greenspoon") the job of taking down the existing Eaton's building. Greenspoon used members of the Labourers Union to operate certain heavy machinery as part of its demolition work. The Labourers have a collective

agreement covering wrecking or demolition with Greenspoon, and have for many years performed such work for Greenspoon. The Operating Engineers do not have a collective agreement with Greenspoon. The Operating Engineers have a collective agreement with Ellis-Don, which requires Ellis-Don to employ only subcontractors which are in contractual relations with Local 793.

4. After the demolition of the building commenced, a representative of the Operating Engineers attended at the demolition site and observed that the heavy machinery was not being operated by members of Local 793. The representative told the site supervisor that in his view the heavy machinery ought to be operated by Operating Engineers. Shortly thereafter, Local 793 filed a grievance against Ellis-Don, asking that Ellis-Don immediately comply with and apply the terms of its collective agreement with Local 793, that it pay damages to Local 793 in respect of its violation of the collective agreement, and "that the company only employ subcontractors who are in contractual relations with Local 793 to perform work as set out in the classifications of the agreement".

5. In response, a representative of Ellis-Don met with representatives of Local 793 to discuss who ought to operate the heavy machinery. Ellis-Don asked for another meeting, with someone from Greenspoon attending. The Operating Engineers agreed, while maintaining that the matter did not concern Greenspoon, as only the grievance against Ellis-Don was at issue. Ellis-Don then advised the person in charge of labour relations for Greenspoon, Ira Greenspoon, that Local 793 was questioning Ellis-Don about the operation of the machinery. Ellis-Don also provided a copy of Local 793's grievance to Greenspoon.

6. Around June 15, 1990, a meeting was held, attended by representatives of Ellis-Don, Greenspoon, the Labourers, and the Operating Engineers. The Operating Engineers asserted that they had jurisdiction over the operation of the equipment in question. They indicated that the basis of their grievance against Ellis-Don was that Ellis-Don was not complying with the sub-contracting clause. One of the Operating Engineers representatives looked at the Labourers Collective Agreement with Greenspoon. He was of the opinion that that collective agreement did not cover the work in question. The Operating Engineers advised Ira Greenspoon that they wanted Greenspoon to hire Operating Engineers to run the equipment. Ellis-Don responded that it felt that this was really a jurisdictional dispute between the two trades and ought to be resolved in that fashion. The Labourers also indicated that this was really a jurisdictional dispute, and not a grievance.

7. After the formal meeting broke up, one of the representatives of the Operating Engineers, Jim Anderson, spoke privately with Ira Greenspoon. During that conversation, Mr. Anderson advised Ira Greenspoon that there was in his view an easy way to solve the problem. If Greenspoon was prepared to sign a collective agreement with the Operating Engineers and have Operating Engineers run the heavy equipment, as the Operating Engineers felt Greenspoon had done in the past, then the matter could be resolved.

8. In testimony at the hearing by representatives of the Operating Engineers it was apparent that the Operating Engineers were seeking the work in question, and not only damages for breach of the subcontracting clause in their collective agreement with Ellis-Don. In the Operating Engineers' view, the work in dispute fell within their jurisdiction, they wanted their members to perform the work, and they wanted to get the Labourers off the job. For these reasons, both to get the Labourers off the job and to get their men on the job, they wanted Greenspoon to sign a collective agreement with them. The goal of filing the grievance was to obtain the work in question. It was quite probable that if Greenspoon signed a collective agreement with the Operating Engineers, the grievance would be withdrawn.

9. The grievance was referred to the Board pursuant to section 124 of the Act on July 20,

1989 (Board File No. 1031-89-G). At the hearing before the Board, it was argued that the section 124 application ought to be deferred pending the filing of a jurisdictional complaint. In a decision dated August 3, 1989, a panel (differently constituted) so deferred the hearing of the section 124 application. On August 24, 1989, the Labourers filed the instant jurisdictional complaint.

10. In these circumstances, have the Operating Engineers required Greenspoon to assign the work in question to them and not to the Labourers, within the meaning of section 91? Put differently, does the Board have the jurisdiction to entertain the complaint, filed pursuant to the Board's earlier decision of August 3, 1989, deferring consideration of the section 124 application.

11. The issue is whether the Board has jurisdiction under section 91 of the Act, not how the Board exercises its discretion under that section. The decision not to proceed with the section 124 application, and to defer it pending the resolution of a jurisdictional complaint, has already been made. Given that decision and the instant complaint, the only issue here is whether the Board has the *jurisdiction* under section 91, not whether the section 124 should have been deferred. In order to have jurisdiction, the Board must be satisfied that (i) a demand for the work has been made, (ii) by the union, and (iii) the demand has been made of the employer (here, the subcontractor Greenspoon). The Operating Engineers request in their grievance that Ellis-Don "only employ subcontractors who are in contractual relations with Local 793 to perform work." There is no question that this grievance constitutes a demand for the work, by the union. Has the demand been made "of the employer"?

12. This grievance is similar to one considered by the Board, also involving the Operating Engineers and the Labourers' in *PCL Constructors Eastern Inc.* [1991] OLRB Rep. Mar. 354. In that case, the Board wrote, in part, as follows:

6. Section 91(1) of the *Labour Relations Act* provides that:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

• • •

As the Board observed in *Schindler Elevator Corporation*, *supra*, the Board has, in the interests of labour relations stability, adopted a broad approach to jurisdictional disputes such that, once satisfied that it has the jurisdiction to do so, the Board will generally hear a complaint concerning work assignment on its merits as such. It is not uncommon for a grievance to raise an issue which is essentially or substantially a jurisdictional dispute. When a complaint under section 91 is filed, or is contemplated, with respect to the same assignment of work which is the subject of the grievance which has been referred to it, the Board is faced with deciding how the dispute is best resolved. The purpose of section 124 is to provide an expeditious mechanism for resolving grievances in an industry in which the nature of the work and the structure of labour relations often renders ineffectual the kind of arbitration provisions typically found in collective agreements. On the other hand, section 91 is specifically designed to be the primary means by which jurisdictional disputes are to be resolved. Accordingly, although there may be circumstances in which it is not appropriate to do so, the Board will often defer consideration of a grievance until a (*bona fide*) jurisdictional dispute relating to the same assignment work has been resolved. When faced with that kind of situation, the Board has generally concluded that a grievance can

constitute a demand for the work in question (*Eaman Riggs Limited*, [1978] OLRB Rep. March 228, *Napev Construction Ltd.* [1979] OLRB Rep. Sept. 886, *Pre-Con Company (A Division of St. Mary's Cement Limited)*, [1981] OLRB Rep. July 947, *Ontario Hydro*, [1982] OLRB Rep. March 428). A jurisdictional dispute complaint need not be dispositive of a grievance before the Board will defer consideration of the latter. Further, as the Board observed in its January 11, 1991 decision in *Vic West Steel Limited*, *supra*:

3. A recurrent complaint from the labour relations community in recent years has been that jurisdictional disputes take too long and are too expensive to litigate before the Board. The community has complained that this situation has developed because the Board has failed to be sufficiently active in directing the proceedings. The Board has been aware of and [is] sensitive to these concerns. It too has experienced some frustration in that respect. Jurisdictional disputes have come to consume an ever increasing and disproportionate amount of the Board's resources. It has become increasingly apparent that the costs of jurisdictional dispute proceedings, both to the Board and to the parties, often far exceed the value of any benefit derived from them. That situation is rapidly going from bad to worse.

7. In this case, the grievance referred to the Board alleges that the respondent "has engaged non-union personnel and non-union sub-contractor [sic] to perform work covered by the agreement" and requests that the respondent "immediately remove the non-union personnel and equipment, comply with and apply all terms and conditions of the Collective Agreement, monetary and non-monetary, and pay to the union in trust all wages and benefits owing as a result of the [respondent's] violation of the collective agreement". Counsel for the applicant conceded that the work which is the subject of the grievance (namely, the operation of shovels, rubber-tired backhoes and skid steer loaders in the demolition of a commercial structure), was performed by members of the Labourers (it says by members of Labourers International Union of North America Local 506) and that the object of the grievance was to obtain the work for its own members.

8. The Board's decisions in *Schindler Elevator Corporation*, *supra*, and *Vic West Steel*, *supra*, indicate that the Board is concerned about the direction that the jurisdictional dispute process before it has taken. We agree with the comments made in those decisions in that respect. It should be evident that the Board intends to give careful scrutiny to request that a proceeding be deferred or adjourned pending the disposition of a jurisdictional dispute. A party making such a request must satisfy the Board both that the matters in issue in a proceeding do raise a jurisdictional dispute *and* that it is appropriate for them to be determined under section 91 of the Act using the Board's jurisdictional dispute procedure before a section 124 referral, for example, is allowed to proceed. This does not mean that it will be the Board's general practice to either defer or not to defer to the jurisdictional dispute process. Each case merits individual consideration in that respect.

9. In *Vic West Steel*, *supra*, what led the Board to proceed with the section 124 referral before the jurisdictional dispute complaint which had been filed was an assertion that the trade union which had delivered the grievance and referred it to the Board, and which grievance was accepted by all concerned to constitute a demand for the work in question, did not hold the bargaining rights upon which the grievance could be based. If, as the respondent employer asserted in that case, the applicant trade union held no relevant bargaining rights, its grievance would be dismissed, and, there being no other demand for the work in question, there would be no jurisdictional dispute within the meaning of section 91 of the Act. The Board went on to note that:

7. Of course, if its grievance fails, Local 1256 could itself file a complaint under section 91 which, if it proceeded, would raise the same work assignment dispute as the present complaint. However, a very significant difference would be that the issue of Local 1256's bargaining rights would have been determined as between the parties. It is true that the existence of bargaining rights is but one factor which the Board considers in determining jurisdictional disputes. However, a review of the Board's jurisprudence makes it readily apparent that it is a very significant factor where one of the trade unions involved holds relevant bargaining rights and the other does not. Consequently, a determination of the bargaining rights question is very likely to put the jurisdictional dispute into different perspective, whichever way it is determined, but par-

ticularly if Local 1256 is found to not hold any relevant bargaining rights. Consequently, resolving this issue before proceeding with a jurisdictional dispute may well reduce the costs of any jurisdictional dispute proceeding both to the Board (and therefore the taxpayer) and the parties.

10. Similarly, the *Schindler Elevator Corporation, supra*, decision must be read in the context of the circumstances set out therein. It is evident that the Board in that case was concerned about the conduct of the grieving trade union and whether there was any *prima facie* merit to the grievance in light of that conduct.

11. Consequently, while we agree with the decisions in *Schindler Elevator Corporation, supra*, and *Vic West Steel, supra*, we were not persuaded that it is appropriate to proceed with this application without first providing an opportunity to file a jurisdictional dispute complaint.

12. In this case, no one suggested that the applicant does not hold the bargaining rights upon which its grievance is based. Nor was there anything before the Board which raised the kinds of concerns raised in *Schindler Elevator Corporation, supra*. Further, the grievance herein is a *prima facie* demand for work which it was assigned by the respondent to and performed by members of the Labourers. It appeared to us that the nature of the issues raised by the grievance and the various interests involved are such that the issues raised by the grievance raise a jurisdictional dispute and are best dealt with under section 91 of the Act through the Board's jurisdictional dispute procedure.

13. Those comments for the most part are equally applicable to the case before us. The Operating Engineers want their members to be operating the heavy equipment, and they want the Labourers removed from the operation of that equipment. The goal of the grievance is to obtain the work in question. The grievance was passed on by Ellis-Don to Greenspoon. The reason for passing on that grievance was to convey to Greenspoon the Operating Engineers' demand for the work, and to invite Greenspoon's response. We need not decide, however, whether the nature of the grievance and its passing on to Greenspoon were alone sufficient to bring this matter within the parameters of section 91 of the Act, given the circumstances.

14. Subsequent to the grievance being passed on to Greenspoon, all the involved parties met to discuss the grievance and the concerns of the Operating Engineers. The Operating Engineers representatives stated that they wanted Greenspoon to use their members to operate the heavy machinery. This was an explicit demand made directly to Greenspoon that the work be assigned to Operating Engineers. To support this demand, the Operating Engineers representative looked through the Labourers collective agreement, asserting that it did not cover the work in question. The Operating Engineers claimed that they had jurisdiction over the operation of the equipment. The statements of the representatives of the Operating Engineers at this meeting were demands of the employer that it assign the work to them, and not to the Labourers. The events of this meeting bring this matter within the purview of section 91 of the Act.

15. The private conversation after the meeting between Jim Anderson and Ira Greenspoon also constituted a demand of the employer for the work in dispute. Jim Anderson told Ira Greenspoon that the grievance could disappear and the matter be resolved if Greenspoon signed a collective agreement with the Operating Engineers. Mr. Anderson was, in effect, telling Greenspoon that if the Operating Engineers were used and the Labourers removed the matter would be resolved. This was a demand that the Operating Engineers be given the work.

16. Amongst other cases, the Operating Engineers relied upon the decision of the Board in *Day Signs Limited*, [1976] OLRB Rep. May 217. In that decision, the facts of which are somewhat similar to those before us, the Board reached the opposite conclusion, holding that it did not have jurisdiction under what is now section 91 of the Act. In reaching that conclusion, the Board noted that it did not have before it evidence that established that the complainant unequivocally desired

or was requesting the work in dispute. Because of that lack of unequivocal interest or evidence, the Board concluded that there was not a demand of the employer for the work.

17. With respect, we do not agree that it is necessary for the Board to conclude that the demand for the work is unequivocal in nature. Rather, the Board must decide, having regard to all the evidence before it, and taking into account the usual factors such as the credibility of the witnesses, the logical inferences in the circumstances, and so on, whether or not the union has made a demand of the employer for the work in dispute. This may be a difficult factual determination in a given case. But it does not require evidence establishing a single unequivocal act indicating such a demand. It requires only that, at the end of the hearing, the Board is able to conclude that such a demand has been made. The Board must try to determine what has really occurred, and try to base its decisions on the reality of events. If a demand could only be found if it were unequivocal, parties could cloak, through the words they used, the true nature of the dispute. The Board ought not to be lulled by such "smoke and mirrors".

18. In any event, the circumstances do demonstrate an unequivocal demand of Greenspoon for the work in question.

19. For these reasons, the Board is satisfied that it has jurisdiction to consider this complaint under section 91 of the Act. The matter will be rescheduled before the prehearing panel for continuation of the prehearing conference.

0947-91-G Sheet Metal Workers' International Association, Local 392, Applicant v. The Electrical Power Systems Construction Association, **E Z Line Construction Ltd.** (#882967 Ontario Ltd.), Respondents v. Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America, Intervener

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Sheet Metal Workers contending that assembly of "meter shed" should have been assigned to them - Carpenters asserting well-established practice of assigning work to "mixed crews" of carpenters and labourers - Carpenters and employer submitting that body of work in dispute so small that it does not warrant potentially time-consuming and expensive jurisdictional dispute inquiry - Up to the parties to do the necessary cost/benefit analysis and determine whether litigation really necessary - Application under section 124 of the Act adjourned pending filing of jurisdictional dispute

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. Lear* and *P. V. Grasso*.

APPEARANCES: *Jerry Raso* and *Mark English* for the applicant; *John Saunders* and *Marna Shecter* for the respondents; *David McKee* and *Tom Hill* for the intervener.

DECISION OF THE BOARD; September 3, 1991

I

1. In this decision the unions potentially affected will be referred to, in abbreviated form, as the "Labourers", "Carpenters" and "Sheet Metal Workers".

2. This is an application under section 124 of the *Labour Relations Act*. The Sheet Metal Workers contend that the respondent employer has contravened the “work assignment” provisions of a collective agreement by which it is bound. Those provisions purport to define the kinds of work which must be assigned exclusively to Sheet Metal Workers. In the Sheet Metal Workers’ submission, the employer contravened those provisions, when it assigned certain work to someone else.

3. The facts are not in dispute.

4. In late May there was a “mark-up meeting” to determine the distribution and assignment of work on a Hydro project. A number of unions were involved in that discussion. The work in dispute is the construction of a “meter shed”, which is a small metal structure very much like the metal garden sheds which are sold for household use. The shed was assembled by a carpenter and labourer working together.

5. The shed consists of prefabricated metal sheets, brackets, and parts which are fastened together with screws. The assembly does not require any sophisticated skills or tools, and can be accomplished in a matter of hours. We are therefore concerned in this proceeding with about two hundred dollars’ worth of work.

6. The Sheet Metal Workers contend that the assembly of this meter shed should have been assigned to them - essentially because it was made of metal and, it is said, sheet metal workers customarily construct ancillary buildings of this kind. The Carpenters, intervening, assert that there is a well-established practice of assigning the work to “mixed crews” of carpenters and labourers - presumably because such ancillary structures were once made of wood, and because employers find the mixed crew economical. The Carpenters submit that the amount of work is so insignificant that it should not be the spark igniting potentially expensive litigation; however, counsel explained that if the Carpenters did not intervene to protect their claim to this work it might later be taken as an admission that the work assignment was improper, or that the Sheet Metal Workers’ claim was valid.

7. The Labourers’ Union has had no notice of this proceeding, and, therefore, has not had the opportunity to intervene.

8. The employer asserts that, at the initial mark-up meeting, it took into account the criteria for work assignment which the Board has affirmed (i.e. the existence of bargaining rights, local area practice, collective agreement provisions, inter-union constitutional arrangements, etc.) and that it properly concluded that a mixed crew was appropriate. The employer submits that it is the “meat in the sandwich”, caught in the middle between rival union claims which it tried to balance, as best it could, in accordance with established criteria. The employer supports the Carpenters’ submission that the body of work in dispute is so small that it does not warrant a potentially time-consuming and expensive jurisdictional dispute inquiry. And to put that submission in perspective, the Board notes that the public and private costs of this proceeding already exceed by many times the value of the work in question.

II

9. Trade unions in the construction industry are primarily organized on the basis of craft, with some unions tracing their origins back to the nineteenth century. At one time, perhaps, craft skills may have been more distinct and distinguishable than they are today, making the allocation of work among unions relatively easy. But that is no longer the case. Technological change, new building materials, and new building techniques have eroded or modified the skills central to some

of the crafts, and blurred the distinctions between others. Some building methods no longer need the experience or expertise formerly required in particular areas, and others have shifted the need from one craft to another. The result has been inter-union rivalry and jurisdictional disputes; and, in the absence of any effective process for resolving those disputes “in the union family”, the task has fallen to the Board under section 91 of the Act. Section 91(1) reads as follows:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

Of course, litigation is an imperfect, time-consuming and costly process for the parties and the public; however, at the present time, neither the law nor the labour relations community has developed a more economical alternative.

10. In the instant case, there is no doubt that the present controversy is, in essence, a jurisdictional dispute. The Sheet Metal Workers claim work under *their* collective agreement, which was assigned to a carpenter and labourer, and paid for under *their* collective agreement. In our view, this matter should be dealt with by application under section 91, so that all interested parties will have an opportunity to participate in the proceeding, and the Board will have the enhanced remedial authority provided by that section. There is much to be said for the Carpenters' plea that relatively minor work assignments should not be permitted to mushroom into costly litigation; and, it may well be that a simple notice is sufficient in such cases to rebut any future inference that a union has acquiesced in an adverse work assignment. However, seemingly insignificant work assignments can sometimes involve important principles, and that is what the Sheet Metal Workers assert here. It is up to the parties to do the necessary cost/benefit analysis and determine whether litigation is really necessary.

11. For the foregoing reasons, the application under section 124 is adjourned pending the filing of a jurisdictional dispute. The parties' attention is directed to Practice Note 15. The parties will have 30 days to make the necessary filings, and, failing that, the section 124 application will proceed.

0132-89-M Ontario Public Service Employees Union, Applicant v. Fanshawe College of Applied Arts & Technology, Respondent

Colleges Collective Bargaining Act - Employee - Employee Reference - Board assessing status of Information Officer, Programme Manager, Parking and Transportation Supervisor, Futures Manager, Ontario Basic Skills Manager and various Administrative Assistants - Board determining certain persons "employees" and others not "employees" with meaning of Colleges Collective Bargaining Act

BEFORE: *G. T. Surdykowski*, Vice-Chair and Board Members *W. H. Wightman* and *R. R. Montague*.

APPEARANCES: *Timothy Hadwen, Tim Little, Jean Crawford* and *Ann Cummings* for the applicant; *Barry Brown, Gayle Malloy-White* and *Gail Rozelle* for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE; September 24, 1991

1. This is an application under section 81 of the *College Collective Bargaining Act* ("the CCBA") which provides that:

81. If, in the course of bargaining for an agreement or during the period of operation of an agreement, a question arises as to whether a person is an employee, including a question as to whether a person employed as a chairman, department head, director, foreman or supervisor is employed in a managerial or confidential capacity pursuant to clause 1(l) and the Schedules, the question may be referred to the Ontario Labour Relations Board and its decision thereon is final and binding for all purposes.

2. In section 1 of the CCBA, "bargaining unit", "employee", and "person employed in a managerial or confidential capacity" are defined as follows:

1. In this Act and in the Schedules,

...

- (b) "bargaining unit" means the academic staff bargaining unit of employees or the support staff bargaining unit of employees set out in Schedules 1 and 2;

...

- (f) "employee" means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2;

...

- (l) "person employed in a managerial or confidential capacity" means a person who,
 - (i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,

- (ii) spends a significant portion of his time in the supervision of employees,
- (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (iv) is employed in a position confidential to any person described in subclause (i), (ii) or (iii),
- (v) is employed in a confidential capacity in matters relating to employee relations,
- (vi) is not otherwise described in subclauses (i) to (v) but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

In addition, Schedule 1 and Schedule 2 to the CCBA provide, respectively, as follows:

SCHEDULE 1

The academic staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology who are employed as teachers, counsellors or librarians but does not include,

- (i) chairmen,
- (ii) department heads,
- (iii) directors,
- (iv) persons above the rank of chairman, department head or director,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) teachers who teach for six hours or less per week.
- (vii) counsellors and librarians employed on a part-time basis,
- (viii) teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than twelve months in any twenty-four month period,
- (ix) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (x) a person engaged and employed outside Ontario.

SCHEDULE 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foremen,
- (ii) supervisors,

- (iii) persons above the rank of foreman or supervisor,
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) persons regularly employed for not more than twenty-four hours a week,
- (vii) students employed in a co-operative educational training program undertaken with a school, college or university,
- (viii) a graduate of a college of applied arts and technology during the period of twelve months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement,
- (ix) a person engaged for a project of a non-recurring kind,
- (x) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (xi) a person engaged and employed outside Ontario.

In contrast to applications to the Board under section 106(2) of the *Labour Relations Act*, in applications under section 81 of the CCBA the Board determines whether or not a person with respect to whom the application is made is in a bargaining unit to which the CCBA applies.

4. In accordance with its usual practice in applications like this one, the Board authorized a Labour Relations Officer to inquire into and report to the Board with respect to the duties and responsibilities of the persons whose “employee” status, within the meaning of the CCBA, is an issue herein.

5. The Labour Relations Officer’s report to the Board in that respect reveals that there were originally thirty persons whose “employee” status was in dispute. It further reveals that in discussions between the parties at meetings convened by the Officer it was agreed that Jane Allardyce, Carolyn Buchanan, John Devlin, Mike Farlow, Chris Flieser, Kent Garrett, Kathy Hogan, Doris Hollinsworth, Patricia Koziol, Debbie Laevens, Gary O’Brien, Doug Pinnell, and Lois Willick are not “employees” within the meaning of the CCBA, and also that Carl McCoomb is an “employee” within the meaning of the CCBA.

6. The “employee” status of sixteen persons remained in dispute between the parties. At the request of the parties, the Officer conducted an inquiry with respect to eight of those persons and submitted his report to the Board in that respect. The parties have requested that the Board determine the status of these eight persons prior to the Officer proceeding with the remaining eight.

7. The evidence before the Board is found in the Officer’s report. It consists of a “questionnaire” completed by each of the eight persons to whom the report relates and *viva voce* testimony adduced with respect to their duties and responsibilities. The Board received the representa-

tions of the parties at a hearing on May 13, 1991, and further written representations were submitted subsequent to the hearing.

8. The intent of the CCBA is to reduce as much as possible the conflicts of interest which would be faced by persons who exercise, or are employed in a position confidential to a person who exercises, managerial responsibilities, or who are employed in a confidential capacity in matters relating to labour relations while at the same time being members of a bargaining unit (see *St. Clair College of Applied Arts and Technology*, [1980] OLRB Rep. July 1067; *Sheridan College of Applied Arts and Technology*; [1976] OLRB Rep. Dec. 844). This legislative separation between two labour relations “sides” recognizes that true collective bargaining requires an arms length relationship between an employer and its employees because their respective labour relations interests and objectives often differ. (The purpose of this kind of separation has often been described elsewhere and does not bear repeating here: see, for example, *Corporation of the District of Burnaby*, [1974] CLRB 1; *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396; *Cambrian College of Applied Arts and Technology*, [1980] OLRB Rep. Jan. 8.

9. Although this kind of separation is common in labour relations legislation, it is not always easy to draw the line of demarcation. The Board has long recognized that an employer structure or organization is an important factor to consider in determining where that line should be drawn. As the Board explained in *St. Clair College of Applied Arts and Technology*, *supra*, in that respect:

3. The structure of a Community College differs from that of a private business, and some care must be taken before utilizing concepts developed in a private sector industrial setting, and superimposing them on a public sector educational institution. No doubt, it was an appreciation of these differences which prompted the Legislature to enact a specialised statute which spells out, in much more detail than in *The Labour Relations Act*, precisely those functions which, if exercised, should exclude an individual from the ambit of collective bargaining. It must be recognized however, that section 1(l) and Schedule 2 are framed in very general language. The application of these provisions to any particular situation is bound to raise interpretative difficulties. There will always be a grey area between those who are clearly included in the bargaining unit, and those who are excluded from it, and the degree and focus of managerial authority will change from employer to employer, and from time to time. The Board must consider the evidence in each case, and apply the legislation in light of the purpose of the statutory exclusions.

(See, also *Sheridan College of Applied Arts and Technology*, [1983] OLRB Rep. Jan. 147).

10. In determining whether a person is an “employee” within the meaning and for the purposes of the CCBA, it is essential that his/her duties and responsibilities be examined as a whole within the context of the particular community college’s corporate structure. Although the CCBA offers more guidance than does the *Labour Relations Act* in that respect, the Board must, as a general matter, determine whether a person whose “employee” status is in issue exercises managerial duties and responsibilities in the sense that s/he is able to affect the job security or economic interests of persons who are “employees” such that s/he is not compatible with them for collective bargaining purposes. We observe that while titles or job descriptions may shed some light on a person’s position in that respect, they do not always reflect a person’s actual duties and responsibilities. It is the latter which the Board is concerned with in applications such as this.

11. Similarly, a person who is employed in a confidential capacity in matters related to employee relations (which, for our purposes, is the same as labour relations) is not an “employee” for purposes of the CCBA. This “confidential” exclusion enables an employer to better ensure that knowledge of its confidential internal labour relations strategies or communications is restricted to persons whose loyalty is more likely to be undivided. A person’s involvement with such information must be more than an occasional or a peripheral one to justify a finding that s/he is not an

“employee”. The real question is whether the person in dispute is consistently exposed to confidential labour relations information as an integral part of his/her functions in the employer’s enterprise. Similarly, access to information which may be sensitive or confidential in some business or general sense is not, by itself, sufficient to justify a finding that a person is not “employee”. In that respect, for example, access to personnel information is to be distinguished from access to confidential labour relations information. It is the labour relations content or potential for use collective bargaining of information which is important for purposes of determining whether or not a person is an “employee”.

12. Further, it is important to remember the purpose of the CCBA is to confer collective bargaining rights on employees of community colleges (as these are commonly referred to). It would frustrate this legislative intent to interpret the statutory exclusions in a manner which would erode or undermine those bargaining rights. The Board must therefore be sensitive to the interests of both sides of the labour relations line.

13. We turn now to deal with the eight persons whose status is being determined at this stage of the application.

(a) Debbie Okun-Hill

This person is classified as an Information Officer. She reports to the respondent’s Manager of Public Relations. She plays no role in formulating objectives and policy in relations to the development and administration of programmes of the respondent or the formulation of the respondent’s budgets. Other than as a conduit for the release of such information to the public, her access to confidential employee or labour relations information is insignificant. However, Ms. Okun-Hill does have direct supervisory responsibility with respect to four bargaining unit employees. She has the power to hire and discipline employees, and she evaluates their work performance. In addition, she schedules vacation time, authorizes and schedules overtime as required, and has the power to approve leaves of absence. In our view, Ms. Okun-Hill spends a significant amount of her time performing supervisory or other typically managerial functions. We therefore find that Debbie Okun-Hill is *not* an employee within the meaning of the CCBA.

(b) Dorothy Robinson

Ms. Robinson is classified as an “Administrative Assistant, Health Sciences and Human Services”. As such she reports to the Chair of Health Services who is responsible for the overall planning, development and delivery of the respondent’s Health Sciences and Human Services Division. There is no doubt that Ms. Robinson fulfills a very important organizational and administrative role. However, we are not satisfied, on the evidence before the Board, that she has any significant role in the formulation of organization objectives or policies with respect to programmes in the Health Sciences and Human Services Division or otherwise, or in the formulation of a budget. Nor are we satisfied that she spends a “significant” portion of her time supervising other employees, that she is formally involved in a truly effective way in hiring or disciplining employees, that she is

employed in a position confidential to any person described in sub-clauses (i), (ii) or (iii) of clause 1(1)(l) of the CCBA, or that she is employed in a confidential capacity in matters relating to employer relations. Further, while Ms. Robinson does have some authority with respect to the scheduling of vacations, hours of work and overtime, we are not satisfied that her duties and responsibilities in that respect are such that she should not be included in a bargaining unit. Accordingly, we find, on balance, that Dorothy Robinson is an “employee” within the meaning of the CCBA.

(c) Maureen Korhonen

Ms. Korhonen is classified as a “Programme Manager, Middlesex Campus”. Some of her duties and responsibilities have a managerial aspect or flavor to them, and she does occupy a position of responsibility with respect to part-time employees (who are not covered by the CCBA). For example, Ms. Korhonen testified that she once discharged a part-time employee. However, on balance, and having regard to the considerations set out in paragraphs 8-12 (above), we are not satisfied, on the evidence before the Board, that Ms. Korhonen’s duties and responsibilities are truly managerial, or that there is any other reason why she should not be considered to be “employee”. We therefore find that Maureen Korhonen is an “employee” within the meaning of the CCBA.

(d) Laura Lush (who, on agreement of the parties, was substituted for Laurel Mattison).

Ms. Lush is classified as an “Administrative Assistant, Business and Management Division”. In our view, Ms. Lush is quite clearly an “employee”. Her “supervisory” responsibilities are not truly managerial in nature and, in any event, occupy only a minor portion of her time. We are not satisfied, on the evidence, that her duties and responsibilities are such that she is incompatible with other employees for collective bargaining purposes. We therefore find that Laura Lush is an “employee” within the meaning of the CCBA.

(e) Valerie Wisniewski

Ms. Wisniewski is classified as “Administrative Assistant, Nursing”. Her duties and responsibilities are primarily organizational and administrative in nature. She does not spend a significant amount of her time performing supervisory functions. Nor is she in a position to affect other employees in ways such that she is incompatible with them for collective bargaining purposes. We are satisfied that there is no reason why she should not be considered to an “employee”. We therefore find that Valerie Wisniewski is an “employee” within the meaning of the CCBA.

(f) Marion Robinson-Dietz

Ms. Robinson-Dietz is classified as a “Parking and Transportation

Supervisor". She reports to the respondent's Manager of Electrical and Mechanical Services. She is a member of the Parking Committee which recommends policies and procedures in that respect, and she is responsible for administering and controlling the respondent's parking and transportation system. Ms. Robinson-Dietz has supervisory responsibility for a General Clerk C, a Maintenance Handyman, Drivers and Security Guards. She has the power to hire, discipline and discharge employees. She schedules vacations, can vary employees hours of work, and authorizes overtime and leaves of absence. She also attends and participates in management meetings of which confidential labour relations matters are discussed and determined. We are satisfied that Marion Robinson-Dietz is *not* an employee within the meaning of the CCBA.

(g) Deborah McEwan

Ms. McEwan is classified as a "Manager, Futures". In the course of the Officer's inquiry, the parties agreed that Ms. McEwan is *not* an "employee" within the meaning of the CCBA and that the Board should so declare.

(h) Carole Rennie

Ms. Rennie was referred to both as a "Manager, Ontario Basic Skills" and as an "Administrative Assistant". In essence she provides administrative assistance to the Principal of the respondent's James N. Allan Campus. A Sessional Instructor (which she hired), 2 Secretary A's, and a Clerk C report to her. She also provides general direction to another employee in the office. Ms. Rennie evaluates the employees she supervises, has the power to issue oral and written reprimands, and schedules vacation and overtime as required. She is also involved in lay-off decisions. We are satisfied that Ms. Rennie spends a significant portion of her time in the supervision of employees. Further, the evidence suggests that Ms. Rennie attends management meetings in which significant labour relations matters are dealt with, and that she is involved in the formulation of policy and objectives in relation to the development and administration of programmes on the respondent. We therefore find that Carole Rennie is *not* an employee within the meaning of the CCBA.

14. In the result, the Board declares that Jane Allardyce, Carolyn Buchanan, John Devlin, Mike Farlow, Chris Flieser, Kent Garrett, Kathy Hogan, Doris Hollinsworth, Patricia Koziol, Deborah Laevens, Gary O'Brien, Doug Pinnell, Lois Willick, Debbie Okun-Hill, Marion Robinson-Dietz, and Carole Rennie are *not* "employees" within the meaning of the CCBA. The Board further declares that Carl McCoomb, Dorothy Robinson, Maureen Korhonen, Laura Lush and Valerie Wisniewski, are "employees" within the meaning of the CCBA.

15. The matter is referred back to the Labour Relations Officer for the continuation of his inquiry as previously authorized by the Board.

1. I dissent with respect to the finding that Maureen Korhonen is properly within the bargaining unit on the basis that, having discharged a part-time employee, she has demonstrated that she not only has managerial authority vested in her but that she has in fact exercised that authority.

2. The majority view, as I understand their notion of “balance”, might have been different had she fired people with some frequency. For my part I can think of no authority more indicative of managerial responsibility than the authority to discharge and the exercise of that authority on even one occasion strikes me as sufficient confirmation of that authority. I suspect this view is shared by the individual who was discharged, if not by my colleagues.

2132-90-R International Brotherhood of Painters and Allied Trades, Local Union 1590, Applicant v. 715329 Ontario Ltd., c.o.b. as **Gallant Painting** and 615823 Ontario Inc. c.o.b. as Lindsay Maintenance Services Painting Division, Respondents

Remedies - Sale of a Business - Painting company ceasing operations following, and as a result of, union's certification - Painting company's owner and "key man" subsequently hired to manage maintenance company's new painting division - Maintenance company thereby acquiring not only key man's expertise and reputation, but also painting company's "goodwill" and place on customer's bid list - Board finding sale of a business and declaring union to be bargaining agent for all employees of the maintenance company's painting division

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. Lear* and *C. A. Ballentine*.

APPEARANCES: *Larry Steinberg* and *R. Last* for the applicant; *Brett H. Kirkpatrick* for 715329 Ontario Ltd., c.o.b. as Gallant Painting and *D. Brent Labord* and *Jim Lindsay* for 615823 Ontario Inc. c.o.b. as Lindsay Maintenance Services Painting Division.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR AND BOARD MEMBER C. A. BALLENTINE; September 25, 1991

1. This application was originally brought pursuant to both sections 1(4) and 63 of the *Labour Relations Act* (“the Act”). At the conclusion of the evidence the applicant (hereinafter referred to as the Union) requested leave of the Board to withdraw that portion of its application brought under section 1(4) of the Act in which it had sought a declaration that the respondents (hereinafter referred to as Lindsay Maintenance and Gallant Painting) were one single employer for purposes of the Act. The Board granted such leave. Accordingly, the only matter which remains to be determined is the successor employer application namely whether there has been a “sale” of a “business” from Gallant Painting to Lindsay Maintenance pursuant to section 63 of the Act.

The Facts

2. Until late 1989, Gallant Painting was in the painting business. More specifically its business consisted of maintenance painting of existing structures primarily at petrochemical complexes in the Corunna and Sarnia areas of the Province of Ontario.

3. The principal shareholder of Gallant Painting is Mr. John Gallant. He is also a director of the company. Mr. Gallant has been in the painting business in excess of thirty years. Although not always incorporated, Gallant Painting had been in business for approximately twelve years.

4. In the fall of 1989 the union was certified to represent the employees at Gallant Painting. Mr. Gallant did not want to continue to operate his business if he was required to recognize the bargaining rights of the trade union and therefore determined to cease operations. There is no doubt that Mr. Gallant's decision to close up shop was solely and directly related to the fact that his company had been organized by the Union.

5. Gallant Painting finished up its work on its existing contracts and discontinued operations in the last months of 1989. It did not bid upon any more work and did not perform any painting work in 1990.

6. While Gallant Painting was operating its maintenance painting business, John Gallant was in every sense of the word the boss and "key man" in the business. He operated the business from his home. He hired and fired employees, determined wage rates, bid on jobs, prepared bids and generally ran the day to day operations.

7. The two primary customers of Gallant Painting were Nova Petrochemicals Inc. ("Nova") at its "Petrosar" location, and Dupont Canada Inc. ("Dupont"). Mr. Gallant estimated that approximately 50 percent of the work of his company was performed for Nova, the remainder for Dupont. The company had been performing maintenance painting at Nova for approximately ten years prior to the cessation of its operations.

8. In the maintenance painting business work is typically obtained through the bid and tender process. Tenders are let by customers and contractors bid for the maintenance painting work available from time to time. When Gallant Painting ceased operations there was one less company competing for the available work. The evidence discloses that a number of companies sought to fill the vacuum created by Gallant Painting's departure by bidding upon work (or similar work) which had previously been let to Gallant Painting.

9. One such company was Lindsay Maintenance.

10. Lindsay Maintenance commenced operations in January 1985. Its sole shareholder and director is Jim Lindsay. Prior to the events which gave rise to this application Lindsay Maintenance was in the maintenance business operating primarily as a mechanical maintenance contractor. The substance of its business operations was the service, repair or retrofit of heating, ventilation and air-conditioning units. The business did perform other maintenance work including plumbing, minor carpentry, sheet metal, structural steel and painting work. Lindsay Maintenance was not however in the painting business. The painting it did perform was painting which was necessarily incidental to its other business operations and represented approximately 5 to 10 percent of its business operations.

11. Lindsay Maintenance has a number of customers for whom it regularly performs maintenance work. One of its larger customers is Nova from whom it obtains in excess of 30 percent of its business (approximately 20 percent from its "Petrosar" petrochemical division and 12/13 percent from Nova Corporate). In addition, it does a substantial amount of work for the Lambton County Separate School Board (18 percent).

12. Jim Lindsay has worked at the Nova Petrosar site (either as an employee of other contractors or as a member of his own business) since 1972. His company Lindsay Maintenance has

worked at the site since the company's inception in 1985. Mr. Lindsay is regularly at the site. Given his level of success in bidding and retaining contracts at that site we have no hesitation in concluding that Mr. Lindsay and his company are well-known and enjoy an excellent reputation at Nova.

13. We also have no hesitation in concluding that both before and after the events which gave rise to this application Jim Lindsay was and remains the boss at Lindsay Maintenance. He hires and fires employees, determines wage rates, deals with customers and their complaints, determines which jobs the company will bid on and then prepares those bids, and generally oversees the operations of the business.

14. In the circumstances of this case the issue to be determined however is whether Jim Lindsay's decision to fill the void created by the cessation of the business of Gallant Painting by starting up a painting division at Lindsay Maintenance resulted in a "sale" of a "business" from Gallant Painting to Lindsay Maintenance pursuant to section 63 of the Act. That issue is in large part a factual one which requires a close examination of the events and circumstances surrounding the establishment and operation of the painting division at Lindsay Maintenance.

15. In early 1990 Jim Lindsay became aware that Gallant Painting was going out of business though a conversation he had with Albert Falloon the contract administrator for the maintenance department at Nova. Mr. Lindsay pursued the matter further. He spoke to others. He investigated the matter to determine if painting work was available or whether tenders for the year had already been let by Nova. He attempted to determine the value of any contract yet to be let by Nova and considered the availability of interior painting work at the Lambton County Separate School Board. Ultimately, Mr. Lindsay decided that the establishment of a painting division within his company was a viable business opportunity provided he could obtain some painting contracts from Nova and the School Board. In particular Mr. Lindsay considered the fact that Nova and the School Board were already customers with whom he was familiar. If he added a painting division he could offer these customers a full range of maintenance services.

16. Having decided that this was a viable opportunity to make money and expand his business, Mr. Lindsay contacted Mr. Gallant. Although he did not personally know Mr. Gallant, Mr. Lindsay was aware that John Gallant had been in the painting business and, more specifically in the painting business at Nova. He knew Mr. Gallant was familiar with the Nova Petrosar site. Mr. Lindsay readily acknowledged that he was entering a business opportunity with which he was not "totally familiar" and he needed someone with expertise. Mr. Gallant was that someone.

17. After Jim Lindsay contacted John Gallant the two men met and discussed the matter. Mr. Lindsay explained his plans to "start up the painting division". He discussed with John Gallant his requirements for a Division Manager. Ultimately, the two men agreed that Lindsay Maintenance would employ John Gallant as the Division Manager of its Painting Division at a weekly salary. In addition, Mr. Lindsay indicated to Mr. Gallant that a season end bonus might be forthcoming depending upon the success of the business. It is Mr. Lindsay's usual practice to pay a season end bonus to employees. Such a bonus is dependent upon the profitability of the operations.

18. Mr. Gallant did not contribute any capital or equipment to assist in the start-up of the painting division. He does not have a share or other interest in Lindsay Maintenance. All money required to start up the painting division came from Jim Lindsay through personal arrangements he made with his bank. Throughout his employment with Lindsay Maintenance Mr. Gallant has been paid a regular weekly salary. He has not received any bonuses from the company.

19. Mr. Lindsay described John Gallant's duties as including site supervision, liaison, and assisting Mr. Lindsay in the preparation of bids. Mr. Gallant was to ensure that jobs were com-

pleted in accordance with the contracts received by ensuring that sufficient materials and personnel were on site to do the job. He was also to "help me [Jim Lindsay] in the estimates. I required some expertise which I did not have." Mr. Gallant described his duties in similar terms stating he was "to organize jobs. Go out and find jobs". At another point in his evidence Mr. Gallant stated quite simply that "he hired me to take care of the painting department". That "taking care of" includes the on-site supervision of employees, the purchase of materials needed to complete the job including the authority to sign cheques for such material, and assistance in the preparation of tender bids.

20. Mr. Gallant commenced work at Lindsay Maintenance in the spring of 1990. With respect to supervisory duties of employees the evidence establishes that Mr. Lindsay was responsible for hiring all employees employed in the painting division and determining the wage rates to be paid to those employees. Mr. Gallant was responsible for the on site supervision of employees. Many of the employees came to Lindsay Maintenance Painting Division through word of mouth when the fact that Lindsay Maintenance would be operating a painting division became generally known. A small number of the employees who came to work for the painting division were persons formerly employed at Gallant Painting. In addition, some summer students hired were former Gallant Painting summer student employees. These summer students are generally family members of Nova employees. As Mr. Lindsay explained it makes "business sense" to hire the sons and daughters of Nova employees. When hiring persons who had previously worked for Gallant Painting Mr. Lindsay did consult with Mr. Gallant. Other than this consultation however all hiring was done by Jim Lindsay.

21. Lindsay Maintenance did not take over any existing contracts, accounts payable or accounts receivable from Gallant Painting. Neither did it purchase any assets or equipment from Gallant Painting. It did on occasion borrow a blaster (a relatively inexpensive piece of equipment used to perform maintenance painting work of the sort done by Gallant Painting) from John Gallant.

22. In the first year of its operations all of the work done by the Lindsay Maintenance Painting Division was for Nova. The total value of this work was approximately 300,000 dollars and represented four successful bids. In addition to its four successful bids at Nova, Lindsay Maintenance was unsuccessful in bidding for two maintenance painting contracts at Nova including its very first bid to that company. It also unsuccessfully bid for certain work at the Lambton County Separate School Board and at Gliss Limited.

23. The process of bidding for work and the circumstances surrounding the actual preparation of bids at Lindsay Maintenance was detailed in the evidence. In particular we heard the evidence of Mr. Jack Peacock, the senior purchaser at Nova who is responsible for determining which contractor's bid will be accepted for the painting work to be performed.

24. Mr. Peacock testified that Nova sends out its request for tender to four or five different contractors whom Nova has determined are capable of satisfactorily performing the work. Nova solicits competitive bidding from such contractors. Mr. Peacock testified that a "qualified contractor" with the lowest bid is awarded the contract.

25. To become a "qualified contractor" at Nova, a contractor is "investigated". Nova determines from the contractor's past performance (either as a direct contractor to Nova or as a subcontractor to a general contractor working at the Nova site) if the contractor is capable of performing the type of work required. That determination is normally made in a meeting by a team of Nova personnel which includes Mr. Peacock and Mr. Albert Falloon. As a mechanical mainte-

nance contractor it was Mr. Falloon with whom Mr. Lindsay regularly dealt while bidding and performing mechanical maintenance work at Nova.

26. Mr. Peacock's evidence discloses that the usual process of placing qualified contractors upon the bidder's list was not followed by Nova in the case of the Painting Division of Lindsay Maintenance. Upon being advised by Mr. Gallant that he was going to be the manager of the Painting Division at Lindsay Maintenance and that some former employees would be working for that division, Mr. Falloon and Mr. Peacock determined to put the company on its bidder's list. We find that Mr. Gallant told Mr. Peacock of his status at Lindsay Maintenance and the experience of his crew in order to be put on the bid list and thereby obtain work for Lindsay Maintenance.

27. Mr. Peacock testified that the stability of Lindsay Maintenance (as indicated by its past performance) and the expertise of Mr. Gallant together with the knowledge that he would be working with some of his former employees caused Nova to place the company on its bidder's list for its maintenance painting work. Mr. Peacock testified that Lindsay Maintenance Painting Division would not have been placed on the bidder's list at Nova at the time it first commenced operations if it had not been for the fact that Mr. Gallant had been hired by Lindsay Maintenance to run the painting division. Mr. Peacock also considered Mr. Gallant's reference to some of his former crew returning to work at the site. Mr. Peacock acknowledged that if Lindsay Maintenance had hired someone else who was equally experienced it could have been found to be "qualified" and placed on the bidders list.

28. From the evidence we conclude that although Lindsay Maintenance Painting Division was not guaranteed to receive any work from Nova merely because it employed John Gallant, the fact that it employed John Gallant enabled it to be put on the bidder's list and provided it with an opportunity to obtain jobs where it was the lowest bidder. Its mere presence on the bidder's list did not guarantee any work but did provide the painting division with the opportunity to successfully bid upon and eventually acquire approximately 300,000 dollars worth of work.

29. At Lindsay Maintenance the bids for available maintenance painting work at Nova were originally prepared by Jim Lindsay. After he prepared the bids and completed his calculations Mr. Lindsay discussed the bid with Mr. Gallant to ensure the bid was appropriate. Mr. Lindsay consulted with Mr. Gallant to ensure that nothing had been overlooked or miscalculated. Mr. Lindsay readily acknowledged that he required Mr. Gallant's expertise in order to be confident that his bid was appropriate and eventually that the work was properly carried out in accordance with the prepared bid.

30. Mr. Lindsay testified that reliance upon or use of Mr. Gallant's expertise was no different than his reliance upon or use of the expertise of his other employees. For example he testified that he prepared all the bids for the mechanical maintenance and painting maintenance work in the same fashion. In his view a prudent, sensible business man surrounds himself with experienced, competent employees in whom he has confidence and to whom he can turn for assistance. Consulting with others in the preparation of bids, whether those bids are mechanical maintenance or maintenance painting bids is part of a system of checks and balances at Lindsay Maintenance which ensures that Mr. Lindsay can be confident in the bids his company makes. It is Mr. Lindsay however who has the final say in determining the work to be bid upon and amounts of the bid. After Mr. Lindsay had made his final decisions on the bid, the bid was typed up, signed by John Gallant as General Manager of the Painting Division and submitted to Nova.

31. Finally we note that when Gallant Painting went out of business the maintenance painting contracts which it had performed in previous years were sent out for tender to other companies. This is typical of a business where maintenance contracts are let on a yearly basis and ten-

dered every year. At Nova, in addition to the Painting Division of Lindsay Maintenance, a number of other companies successfully bid upon work which had previously been performed by Gallant Painting.

32. Lindsay Maintenance did not bid upon any jobs at Dupont the other major customer for whom Gallant Painting had performed 50 percent of its work. The evidence discloses that the bulk of the Dupont work which had previously been let to Gallant Painting was obtained by a newly created company formed by a former Dupont employee who also hired some former Gallant Painting employees.

Submissions of the Parties

33. Do these facts disclose that there was a “sale” of a “business” from Gallant Painting to Lindsay Maintenance?

34. The respondents assert not and argue that the evidence discloses no more than the fact that a pre-existing company which had by and largely operated as a general maintenance contractor offering full service maintenance seized upon an opportunity to expand its own business when Gallant Painting went out of business. The respondents rely upon *British American Bank Note Company Limited*, [1979] OLRB Rep. Feb. 72 in support of their position that the trade union’s bargaining rights attach to a predecessor’s “business” and not the work being performed by that business. Thus, the fact that Lindsay Maintenance Painting Division now performs some of the work which in the past had been performed by Gallant Painting is not critical. This is especially true when considered in the context of the bid oriented nature of the maintenance painting business where contracts are let on a yearly basis to the lowest bidder. That Lindsay Maintenance Painting Division obtained some work which had formerly been performed by Gallant Painting is not critical is highlighted by the fact that all of the work previously performed by Gallant Painting at Dupont went to another contractor, and the fact that at best Lindsay Maintenance acquired only a portion of the work at Nova. Other contractors also acquired work at Nova.

35. The respondents also relied upon *Twin Electric*, [1986] OLRB Rep. September 1320 in support of the submissions that there was no disposition of anything from Gallant Painting to Lindsay Maintenance. There was no transfer or sale of assets, inventory, tools or work. It was asserted that the definition of “sells” in section 63 contemplates a transfer for consideration. In the circumstances of this case the essential ingredient of consideration was missing as nothing passed between the two corporate entities. The hiring of an employee such as John Gallant does not constitute consideration and does not amount to a disposition of a business. Counsel asserted that in circumstances such as these it is inappropriate to in effect accept that bargaining rights attach to an individual.

36. The applicant argued that the business of Gallant Painting rested in its principal asset John Gallant. He was the “key man” in the business. When John Gallant left the business of Gallant Painting and joined Lindsay Maintenance he took with him that primary asset and applied it to the benefit of Lindsay Maintenance. It was John Gallant’s expertise, experience and skill which enabled Lindsay Maintenance to set up and operate the Painting Division. Although Lindsay Maintenance could perhaps have acquired that expertise from some other source, the fact that it did not do so is important. In addition to his expertise, John Gallant brought with him to Lindsay Maintenance the added advantage of someone who knew the Nova site, the Nova personnel, the procedures, the type of work to bid and the type of work to be done. As a result Lindsay Maintenance was able to be put on Nova’s bidder’s list and subsequently obtain work.

37. The applicant submitted that in acquiring the skill, contacts and reputation of John Gal-

lant, Lindsay Maintenance acquired the “business” of Gallant Painting. In this type of bid oriented business the most important assets of the business are the ability to bid and estimate jobs and the ability and expertise to carry out those jobs. Without John Gallant Lindsay Maintenance did not have these assets. The transfer of those assets brought these circumstances within the purview of section 63 of the Act. In making these submissions counsel relied upon *Deluxe Electrical Contractor Ltd.*, [1990] OLRB Rep. Nov. 1135, *Ably Concrete Floor Limited*, [1991] OLRB Rep. May 579, *Stucor Construction Ltd.*, [1987] OLRB Rep. April 614, *Construction PH Grager Inc.* [1985] OLRB Rep. Feb. 233.

Decision

38. Section 63 of the Act states:

63. (1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

39. Included in the Board’s jurisprudence under section 63 are a number of “key man” cases including those referred to by counsel for the applicant. None of the cases are particularly helpful as it is clear that each case generally turns on its own facts. Certainly there are a number of cases in which the movement of a key person to a new entity did not attract labour relations consequences pursuant to section 63 of the Act (see for example *Jen Ry Utility Contracting Co. Ltd.*, [1984] OLRB Rep. Dec. 1724, *Braneida Mechanical Service Ltd.*, [1981] OLRB Rep. Aug. 1102, *Rivard Mechanical*, [1981] OLRB Rep. May 550). Those cases are distinguishable from the facts and circumstances in this case. The facts before us are also distinguishable from the “key man” cases referred to by counsel for the applicant in which labour relations consequences did attach to the acquisition of the services of a key person by the successor employer. In each of the cases referred to by the applicant an additional factor was present. Thus in *Stucor Construction Ltd.*, *supra*, and *Deluxe Electrical Contractor Ltd.*, *supra*, the successor also acquired certain fixed assets and equipment from the predecessor. In *Construction P. H. Grager Inc.*, *supra*, the predecessor undertook not to compete with the successor and assumed an ownership role with the successor. In *Ably Concrete Floor Ltd.*, *supra*, (a case which most closely resembles the facts before us) the predecessor transferred work to the successor and the successor performed or completed existing contracts of the predecessor. In determining whether there was a “sale” of a “business” for purposes

of the Act in this instance therefore we find it useful to briefly review the principles which underline the application and interpretation of section 63.

40. Section 63 is a remedial provision of the *Labour Relations Act* the purpose of which was succinctly summarized by the Board in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 702 and the *Tatham Company*, [1980] OLRB Rep. March 366. In the *Tatham Company*, *supra*, the Board referred to *Aircraft Metal Specialist Limited*, *supra*, in paragraphs 19 and 20 and stated:

19. ...

“The purpose of section 47a [now section 55] [now section 63] becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect ‘paper transactions’, and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond ‘paper transactions’ to achieve that purpose. See, e.g. *Kem’s Masonry*, [1964] OLRB Rep. Dec. 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business.”

20. Section 55 [now section 63] prevents the destruction of bargaining rights or a dislocation of the collective bargaining *status quo*, by transforming the institutional rights of the union and the collectively bargained rights of the employees into a form of “vested interest” which becomes rooted in the business entity, and like a charge on property, “runs with the business.” To accomplish this objective, the statute gives a very special meaning to the word “sale”, envisages that bargaining rights can be continued in a severable “part” of a business, abrogates the notion of privity of contract, and eliminates the significance of the separate legal identity of the new employer.

41. As noted, section 63 is designed to preserve bargaining rights where there is a “continuum of the business”. (See also *Thunderbay Ambulance Services Inc.*, [1978] OLRB Rep. May 467.) The broad and liberal interpretation which the statute has given to the term “sells” as including “any other manner of disposition” underscores the purpose of the section. Regardless of legal form, and regardless of the actual physical transfer of fixed assets, inventory or equipment, customer lists, accounts receivable or the like, for labour relations purposes a “business” or “part of a business” may nonetheless have been “transferred” or “disposed” of in “any other manner”.

42. Given the remedial purpose of section 63, the primary focus of the Board in applications under section 63 is what is the “business” of the predecessor to which the bargaining rights have become attached or “vested”. Rather than focusing upon the legal forms and commercial transactions which surround the circumstances which gave rise to the section 63 application, the Board looks to the predecessor’s “business” and determines if this has been “disposed” of in some manner to the successor or if there has been a continuum of that business by the successor. Have the essential elements of the predecessor’s “business” been transferred to the successor thereby

enabling the successor to continue the business? (See for example *Grand Valley Ready-Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663)

43. The determination as to what constitutes the “business” of the predecessor is not an easy task. The Ontario Labour Relations Board Reports contain a multitude of cases involving section 63 applications. It is however impossible to extract from these cases a single factor or element which is always determinative. The difficulties surrounding the factual determinations which the Board must make are compounded by the fact that the elements or factors which are significant in each case can vary with the business context. As a result, there are very few “text book” cases. As was noted in *The Tatham Company Limited*, [1980] OLRB Rep. Mar. 366:

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while arising out of materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a ‘sale of business’ finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, ‘know-how’, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section [63] must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

44. A “business” is the totality of the undertaking. A “business” may include such tangible assets as tools, equipment, machinery, physical buildings together with such less tangible assets as skilled management and operating personnel and intangibles such as goodwill (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193). A “business” must be distinguished from the work performed or carried out by the business. This is particularly true in circumstances such as the present which involve a business which obtains its work by being the successful bidder on contracts which are regularly sent out for tender (either public tender or invited tender).

45. Although from a labour relations perspective the importance of a “business” is the jobs that it provides for employees, the mere continuity of work performed is not always sufficient to found a section 63 declaration. For this reason although we have considered it, we have not attached critical or undue importance to either the fact that Lindsay Maintenance is now performing work formerly performed by Gallant Painting at Nova, or the fact that another company is performing substantially all of the work formerly performed by Gallant Painting at Dupont. In this regard we concur with the statements of the Board in *Metropolitan Parking Inc.*, *supra*, where it referred to the decision of the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYC Ltd.* et. al., [1978] 1 Can. L.R.B.R. 565 and stated at paragraph 36.

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand. [emphasis added]

A continuity of the work and/or the employees is significant, but it is not always sufficient, to

sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 - a case which, like the present one, involved the consequences of a loss of a contract:

There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

The focus of section 55 is the business entity - the employer's total economic organization - not simply the work which the employees perform.

46. Our focus in the instant application is to determine whether there has been a disposition of the essential elements of a particular business from one employer to another. As the Board stated in *Metropolitan Parking Inc.*, *supra*, at paragraph 38:

Is the transfer, if any, from the predecessor merely incidental, or is it integral, to the successor's ability to produce the goods or supply the services formerly produced by the predecessor?

And further, at paragraph 44:

44. For a transaction to be considered a "sale of a business" there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a "going concern". A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so. Bargaining rights are continued only when the employer transfer *his* business. The use of the active verb and possessive pronoun is not insignificant.

47. What then are the essential elements of the business? What is its "total economic organization?" The evidence confirms that the maintenance painting business is a bid oriented business. In this type of business the essence of the business resides in the experience and expertise of its management personnel. To be financially successful the essential elements of the maintenance painting business are the expertise to price and bid upon jobs, and the skill and ability of personnel who can perform the job within the limits of a successful bid (see for example, *P. H. Grager*, *supra*, and *Stucor Construction Ltd.*, *supra*). It is not the tools or physical assets which are the "essence" of the painting maintenance business. It is the skill, experience and expertise of its key management personnel.

48. We find that at Gallant Painting the essential elements of the business resided with John Gallant. At Lindsay Maintenance, *for the Painting Division* these essential elements continue to reside with John Gallant. In so finding we acknowledge that at Lindsay Maintenance, Jim Lindsay is the boss, the person with ultimate control. We also acknowledge that Jim Lindsay might have expanded his existing operations and entered into the painting maintenance business without John Gallant. Indeed the respondents have argued that Lindsay Maintenance merely extended or expanded its own parallel business. As indicated herein we do not accept that assertion.

49. Although it is true that Lindsay Maintenance might have started from scratch gradually building up the kind of skill, experience and expertise and knowledge enjoyed by Gallant Painting,

it did not do so. Lindsay Maintenance might have hired someone with skills, know how and experience similar to those of Mr. Gallant to assist it as it slowly built up the business to the level of expertise and recognition enjoyed by John Gallant and Gallant Painting. The fact remains however, that it did not do so.

50. Lindsay Maintenance saw an opportunity when Gallant Painting suddenly ceased operations. As Mr. Lindsay testified he decided to take advantage of that opportunity. One way Lindsay Maintenance took advantage of the opportunity was by acquiring the skills and expertise of John Gallant. In so doing, Lindsay Maintenance also acquired the built-up experience, familiarity, reputation and personal contact of John Gallant and Gallant Painting.

51. For the critical period of its start-up operations, Lindsay maintenance Painting Division relied upon and took advantage of its primary asset, John Gallant. That John Gallant was an asset of such considerable value is attested to by the evidence of Mr. Peacock which establishes that Lindsay Maintenance was put on the bidders' list because the acquisition of John Gallant's services made Lindsay Maintenance a "qualified contractor".

52. By hiring John Gallant, and thereby acquiring the key asset of his business, Lindsay Maintenance obtained the critical ingredient which it otherwise lacked to be put on the qualified contractors bidder's list at Nova. By hiring John Gallant it was placed on the bidders' list and given the opportunity to bid upon work-an opportunity it did not otherwise have.

53. Lindsay Maintenance did not get put on the bidders' list at Nova when it did because of Jim Lindsay's entrepreneurial qualities, his undoubted initiative or his own personal reputation. Lindsay Maintenance got its "foot in the door", its "leg-up" in the maintenance painting business because it acquired and was able to use the skill and reputation of John Gallant. Lindsay Maintenance acquired John Gallant's skill and experience not only in bidding and acquiring jobs, but also his expertise and know how in field operations. It obtained his ability to organize materials and man power to ensure the job was performed within the bid price.

54. In this way the operation of the Painting Division at Lindsay Maintenance differs from the manner in which Lindsay Maintenance handles the mechanical maintenance contracts it acquires. Mr. Lindsay is a refrigerator and air-conditioning mechanic who holds both an electrician's and gas fitter's licence. For the mechanical maintenance contracts acquired by Lindsay Maintenance he has the personal skill, expertise and experience necessary to make him a successful contractor. In addition, as a prudent, sensible business man he undoubtedly uses all the resources available to him to properly bid mechanical maintenance jobs and perform those bids upon which he is successful. Those resources include his employees who perform the mechanical maintenance jobs and his site supervisors/foreman.

55. However, when it came to starting its new maintenance painting business Mr. Lindsay could simply not rely upon his own skill, expertise and experience or those of his existing personnel. It was a new venture for Lindsay Maintenance to embark upon this line of work. Although it had done some maintenance painting work in the past, a new undertaking of the size contemplated required the special skill and experience of an expert - at least until Mr. Lindsay learned the ropes. That expertise came from Gallant Painting to Lindsay Maintenance in the form of John Gallant. That expertise got the new business at Lindsay Maintenance off the ground allowing it to extend its operations into an area of the maintenance business in which it had not previously performed much work. This was not simply an expansion of Mr. Lindsay's existing business. It was an entirely new undertaking, one in which the company had not previously been involved and one with which Mr. Lindsay was not "totally familiar". The "roots" of the maintenance painting division at Lindsay Maintenance spring from John Gallant.

56. The respondents have argued that there was no consideration. We do not agree. In our view consideration can be found in the very hiring of John Gallant. Put simply in the traditional language of purchase and sale, Lindsay Maintenance bought the skill, expertise and reputation (and all that came with those assets as referred to herein) of John Gallant. With these assets and a promise to apply them to the benefit of Lindsay Maintenance John Gallant bought his employment. It is therefore unnecessary for us to decide whether consideration is or is not a necessary ingredient for a successful section 63 application.

57. The respondents also argued that the only thing that passed between the two corporate entities was John Gallant - a person who is a mere employee of the alleged successor Lindsay Maintenance in the same manner as the Lindsay Maintenance mechanical supervisors/foremen. We do not agree. Lindsay Maintenance didn't simply hire John Gallant. It acquired his expertise and reputation and used those to obtain the very things Gallant Painting previously had - the most important of which was a place on Nova's bid list and therefore the opportunity to bid upon Nova work.

58. In our view this is not simply an acquisition of a "key man" case for the facts taken in their totality disclose much more. Lindsay Maintenance acquired Gallant Painting's "goodwill" for any goodwill of that company came by reason of its owner John Gallant and the Gallant name. It acquired some of Gallant Painting's employees - those who apparently had previously worked at the Nova site. It occasionally borrowed equipment from John Gallant. It acquired one of Gallant Painting's two major customers. In this regard we are of the view that Lindsay Maintenance was not merely servicing its own existing customer. Rather it was put on this customer's bid list for maintenance painting work. It did not previously have a place on that bid list and had not previously done that type of work. Although Lindsay Maintenance may not have needed John Gallant to "introduce" it to Nova as a customer, it did need and use John Gallant to get its name on the maintenance painting bid list of that customer.

59. For all of these reasons and given the purpose and rationale of section 63 we find that for labour relations purposes the events which gave rise to this application constitute a "sale" of a "business" pursuant to section 63 of the Act.

60. That business however forms only a part of the totality of the business of Lindsay Maintenance. That in our view is a matter which the Board can consider in the exercise of its discretion under section 63(3) and 63(4) and more specifically in defining the "like bargaining unit" referred to in section 63(3). The Board raised this matter with the parties.

61. The applicant submitted that in the event the Board found that the business of Gallant Painting had been sold to Lindsay Maintenance it sought only to preserve its existing bargaining rights in relation to the Painting Division of Lindsay Maintenance. Although the union has been certified to represent all employees of Gallant Painting in the City of Sarnia, Moore Township and Sarnia Township, save and except non-working foremen and persons above the rank of non-working foreman, sales, office and clerical staff, the union acknowledged that in actual fact it represented only painters and painters' apprentices at Gallant Painting. Apparently Gallant did not employ any persons in any other non-managerial employee classifications. Although invited to do so by the Board counsel for Lindsay Maintenance did not make any submissions with respect to the application of either sections 63(4) or 63(6) of the Act to the facts in the event the Board determined that a "sale" of the "business" had taken place.

62. In the result therefore we find and declare that there has been a sale of a business from Gallant Painting to Lindsay Maintenance within the meaning of section 63 of the Act. We further declare that as result of such sale the International Brotherhood of Painters and Allied Trades,

Local Union 1590 is the bargaining agent for all employees of Lindsay Maintenance employed in its painting division, save and except non-working foremen and persons above the rank of non-working foreman, sales, office and clerical staff. The bargaining rights which the union acquired for the employees of Gallant Painting were limited to employees not engaged in construction. The bargaining rights which we have herein declared it holds for employees employed in the painting division of Lindsay Maintenance are similarly restricted to "non-construction" employees. Having regard to the provisions of section 63(3) the trade union is entitled to give notice of its desire to bargain with a view to making a collective agreement with respect to those employees for whom we have declared it is the bargaining agent.

DECISION OF BOARD MEMBER J. LEAR; September 25, 1991

1. I dissent.

2. In this application we are asked to determine that the employment of a manager to develop and control the operations of a newly-established painting division of an already firmly-established and successful mechanical maintenance company constitutes the sale of a business as defined by section 63 of the Act. The question arises because the manager, John Gallant, formerly operated his own business, Gallant Painting, employees of which the applicant union was certified to represent in the fall of 1989. Shortly thereafter, in the belief that unionization would cause his company to become uncompetitive, Mr. Gallant closed down his business.

3. In February, 1990, becoming aware of a void, and therefore of a business opportunity, in the type of work done by Gallant Painting, and realizing that this work was a natural extension of the operations already undertaken by himself, Jim Lindsay, owner of the mechanical maintenance company, Lindsay Maintenance, assessed the value of the opportunity. Having pursued exhaustive enquiries with prospective customers (only some of them former clients of Gallant Painting) to evaluate potential work volumes, and with his insurers, accountant, the Workers' Compensation Board, and finally his bankers, Mr. Lindsay concluded that a viable opportunity indeed did exist to expand his business successfully. He realized, however, that he would need someone to manage that new division, partly to supplement his own not-too-extensive painting experience, partly because he was greatly committed already to running his \$0.8 million annual mechanical maintenance business. At this point he approached Mr. Gallant and offered him employment as manager of the new painting division.

4. The majority has decided these circumstances constitute transfer of a portion of Mr. Gallant's former business and, therefore, a sale as contemplated by the wording of section 63. I do not agree.

5. What, in fact, did Lindsay Maintenance acquire from Gallant Painting? A new employee, John Gallant by name, to head up its newly-opened painting division as General Manager. Nothing, absolutely nothing, else. John Gallant brought with him his management knowledge and experience. But that is exactly what any person recruited as a "Manager" is expected to bring to his or her new employer. Why would anyone recruit a complete novice as manager if the intention is to improve or to further develop a business?

6. The question which is crucial to the whole issue is, in employing John Gallant to do this job did Lindsay Maintenance acquire more than it could have gained either by employing an experienced manager recruited from another painting company or by using its own depth of experience? In a finding under section 63, Mr. Gallant's contribution would need to be shown as some-

thing unique which neither of the alternatives could have provided. I do not believe the evidence confirms the existence of anything unique.

7. In *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, the Board stated at paragraph 38:

Is the transfer, if any, from the predecessor merely incidental, *or is it integral, to the successor's ability to produce the goods or supply the services formerly produced by the predecessor?*

[emphasis added]

In *Grand Valley Ready-Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663, at paragraph 19, the Board referred to the need to identify essential elements involved in an alleged transfer:

The answer is to be found in an examination of the two business organizations which existed prior to the transaction. In most section 55 [now section 63] applications, whether involving the alleged sale of a whole business or a part thereof, the nature of the alleged predecessor's business organization provides the ultimate answer. The Board *identifies its essential elements and determines if sufficient of these have been transferred to the successor as to allow the business and the employment which it generates to continue*. ... However, if ... assets have been disposed of which are peripheral or unrelated to the business organization to which the bargaining rights at issue attach, the Board will not find that there has been a sale of a business within the meaning of the section.

[emphasis added]

8. What "essential elements", then, did John Gallant bring from his previous business and were these integral to the success of Lindsay Maintenance in supplying the services formerly supplied by Gallant Painting? In total, 4 can be identified:

1. *Management* of a painting enterprise.
2. An *introduction* to his former clients.
3. An expertise in *estimating* for industrial painting.
4. A *guarantee* his employment would enable Lindsay Maintenance to qualify as a painting contractor with Nova.

Each will be examined in turn.

9. *The management*. The ability to manage a painting enterprise does nothing to support the notion of a "sale". Mr. Lindsay needed to hire this ability only because of his own commitment to running the mechanical side of his business; in a pinch, he could have operated without a painting division manager. Also, he could have employed anyone with management expertise - for the purpose only of *managing* there was no requirement for a painting background.

10. *The introduction*. Although he did some work for others at times, Mr. Gallant testified that almost invariably his total annual work volume was shared equally between Dupont and Nova. He did not effect an introduction of Lindsay Maintenance to Dupont, where the type of work he had been doing had been taken over by a former Dupont employee, using Gallant's former painters. It appeared Lindsay had no chance of an entry there. To the other client, Nova, Mr. Lindsay needed no introduction. He was an employee there from 1972 until 1985, when he left to set up his own business doing the very work, and most of it for Nova, that he had performed there as an

employee. Though for mechanical business purposes he did not often deal directly with Mr. Peacock, Senior Purchasing Officer at Nova, who handled painting contracts, Mr. Lindsay was well-known to Mr. Peacock. So for introductory purposes Mr. Gallant brought nothing to Lindsay Maintenance.

11. *The estimating.* Mr. Gallant certainly brought with him painting estimating skills. Any other experienced painting manager would have brought them, too. Painting is highly labour-intensive, requiring few and readily-available materials and little equipment. In addition, although no evidence was presented on this point it is my experience that many of the factors which introduce a high degree of uncertainty and speculation into some aspects of estimating, such as ground conditions and stability, equipment suitability, deployment, and availability, material delivery and sub-trade scheduling, are absent from painting. In such a labour-intensive trade where average outputs are, within reason, quite predictable, it is the hourly labour rate which is the very essence of the bid. It is significant that painters formerly employed by Mr. Gallant quit Mr. Lindsay's employment after complaining about the rates of pay.

12. In its first year of operation, 4 out of 6 painting bids by Lindsay Maintenance to Nova were successful - a success ratio of 66%. The usual number of bidders - we were told from 3 to 5 - should have given a success ratio ranging down from 33% to 20%. This ratio is much more indicative of low labour rates than of any margin of skill in the estimating process itself. To illustrate further Mr. Lindsay's tight control of labour costs, we were told his success rate on mechanical work for Nova, where a good proportion of the mechanical bidding is based on quoting a fixed labour rate per hour for future work to be done as required, was a remarkable 90%, though once more 3 to 5 bids were said to be the norm. Again, this rate of success must be attributed to a strict attention to labour costs. Add to this that about 5% to 10% of Lindsay Maintenance's annual volume of work was already in painting, that apart from being fully capable of successfully bidding that work Mr. Lindsay had taken estimating courses and maintained his own reference library of estimating books, and that records of production standards for painting are readily available. Mr. Lindsay, too, is a practical and versatile entrepreneur and appears to have an intuitive grasp of workplace lore; within his mechanical operations he has carried out electrical, plumbing, carpentry, structural steel and refractory bricklaying works, as well as the heating, ventilating and air-conditioning normally associated with the 'mechanical' reference. He was, then, far from incapable of estimating quantities of paintwork production, and it is not difficult to believe that Mr. Lindsay would have been quite successful in bidding for paintwork from Day 1 without any expert assistance. In my opinion, what Mr. Gallant gave to Mr. Lindsay in estimating for paintwork was confidence, rather than knowledge, and could not represent any part of a "business" acquisition.

13. *The guarantee.* Did Mr. Gallant's employment guarantee a place on the Nova painter bidding list for Lindsay Maintenance? There is no doubt Nova does maintain a list of "qualified" bidders, though there is a certain vagueness about how one becomes qualified. Obviously, reliability, financial stability and the ability to carry out a painting operation would be prerequisites. Beyond these, Mr. Peacock, who normally lets painting contracts for Nova, testified in cross-examination that a "qualified" contractor was "one who was investigated and whose past performance suggests he can do what we require". He further testified that qualification was determined by a team, and that in the case of maintenance contracts the team included Mr. Falloon, Maintenance Contract Administrator, and himself. However, in the case of the Lindsay painting division there was no formal team meeting. Instead, Mr. Falloon and himself, knowing Mr. Gallant was its manager, and that some of Mr. Gallant's former employees would be working for it, decided between themselves to add Lindsay to the list. *This is the sole item of evidence which could maybe demonstrate that Lindsay Maintenance truly benefited from an "essential element" of Mr. Gallant's former business.* Significantly though, Mr. Peacock added that "perhaps the stability of Lindsay Maintenance

nance influenced our decision a bit, *knowing John (Gallant) was not off on his own somewhere*". As a testimonial to the value Nova placed on the overall integrity and reliability of the Lindsay organisation, probably the second part of that statement carries a far greater import than the first. Again, when asked if it was fair to say that if he not known Mr. Gallant was going to Lindsay with some of his former crew, Lindsay Maintenance would not have gone on the "qualified" list, although Mr. Peacock said "at that point in time that would be a correct statement", he also conceded "if Lindsay (paint division) had been in existence and qualified and put in the most competitive bid he would have got the job whether John (Gallant) was there or not". Such comments hardly support the contention that Jim Lindsay could not have developed his painting division as quickly as he did without the use of John Gallant. (emphasis added)

14. Considering what was required for qualification, clearly Lindsay Maintenance lacked nothing except a broader experience in painting than it had already. The question is, given the undoubted high regard in which Lindsay Maintenance was held by the Nova people, given its record of success, stability and reliability in the diverse variety of work items it tackled on the project, given that Nova clearly required a dependable painter to fill a void and to ensure a genuinely competitive atmosphere following the departure of Gallant Painting from the scene, would Nova have qualified Lindsay Maintenance to bid on painting work, even if John Gallant, or any other experienced painter for that matter, had not come on board? On the balance of probabilities, I do not believe that with its long experience of the competence of the Lindsay organization Nova would have said "No". The employment of Mr. Gallant as manager simply gave Nova a comfortable feeling about the thing.

15. I have made no direct comment on the employment of former Gallant employees by Lindsay Maintenance. Although it can be argued that those who joined Lindsay did so because Mr. Gallant attracted them there, an argument of equal merit is that these were simply part of a pool of painters in an area where the opportunity for employment which had diminished with the closure of Gallant Painting had now opened up again with the creation of the Lindsay painting division. This has no bearing at all on the "sale" consideration.

16. None of the cases to which we were referred was of assistance in reaching a decision in this one. All others included at least one material consideration or one positive feature of control which formed part of a transfer. This case involves nothing but an experience. It is for this reason that the background Mr. Gallant brought to his position as an employee of Lindsay Maintenance has to be carefully analysed and critically appraised to establish its true worth in the context of both the construction activity trade and location in which he operated.

17. As an aside, it should be noted that the construction industry includes a vast majority of small entrepreneurial enterprises, many of which fail to survive over the long term. Given that the circumstances in this case relate to the opening of a new division by Lindsay Maintenance, and are thus a little unusual, the majority decision does, nevertheless, carry the implication that bargaining rights may attach to a person who becomes no more than an employee of another company. It is of concern that this decision may seriously restrict the opportunities of unionized employers whose companies have failed or closed down to obtain future employment with a non-unionized company.

18. Having set out above and examined in detail all of the "essential elements" of the transfer of business, there is nothing to convince me that anything which could be considered to be in the nature of a sale as contemplated in section 63 ever took place. Accordingly, I would have dismissed the application brought by Painters', Local Union 1590.

1400-91-U Amalgamated Clothing and Textile Workers Union, Complainant v. Georgian Industries Inc., Respondent

Adjournment - Practice and Procedure - Witness - Unfair Labour Practice - Complainant alleging that witnesses summonsed by union in certification proceeding were disciplined because they were so summonsed - Company seeking adjournment due to unavailability of witness - Counsel for company giving various undertakings - Board directing that the action taken against the grievors by the company be cancelled and that copies of the Board's decision be posted in the workplace - Adjournment granted

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *G. O. Shamanski* and *E. G. Theobald*.

APPEARANCES: *John H. Stevens* and *Marrisa Pollock* for the applicant; *Kees W. Kort*, *Ben Ball*, *Kathy Jamieson* and *Jim Lang* for the respondent.

DECISION OF THE BOARD; September 6, 1991

1. This is a complaint that the respondent breached sections 64, 67, 70, and 80 of the *Labour Relations Act*.

2. At the first day of hearing, the respondent requested an adjournment. In that respect, the Board gave the following oral decision, which we hereby put in written form:

This is a request for an adjournment on behalf of the respondent, because of the unavailability of what the respondent asserts is its key witness. That key witness is a lawyer in the same firm as counsel before us today, which lawyer has carriage of an ongoing certification and section 89 proceeding involving the same parties. Because of his involvement in the ongoing dispute between the parties, his evidence, it was asserted, would be essential with respect to the issues in front of the instant panel in the instant complaint. Prior to notice of hearing in the instant complaint being sent, that counsel had committed to the last day of a seven day arbitration proceeding, for today's date, on which he was also acting as counsel.

This counsel however was not summonsed to attend today by the respondent. He did make some effort to obtain a consent adjournment of that arbitration proceeding, but in the result the other party did not agree to it.

This witness's evidence does appear to be relevant, for the reasons expressed by counsel for the respondent. This is so if for no other reason than the fact that sections 64 and 70 of the Act are pleaded by the complainant, which sections can carry motive aspects. The witness's evidence would touch upon the reasons why the company acted as it did.

The nature of the complaint before us is that witnesses summonsed to attend with respect to the ongoing certification and section 89 proceedings were disciplined by the respondent company because they were so summonsed. The next hearing date in the ongoing proceeding is September 18, 1991.

In these circumstances, but for the undertakings and consent by Mr. Kort,

counsel for the respondent, on behalf of the respondent, we would not have granted the adjournment. The nature of the complaint before us and the ongoing proceedings for which the individuals were summonsed to attend demand a quick Board hearing and quick Board response. There was ample Notice of Hearing given to the respondent. The witness said to be the key witness was not summonsed to appear today by the respondent. That witness chose to attend the other proceeding. Further, there would be substantial prejudice to the complainant if this matter were to be adjourned, assuming of course that the complaint ultimately was upheld.

However, given Mr. Kort's position, there is no prejudice in granting the adjournment request, provided it be on the terms that follow. Any potential prejudice can in our view be cured by Mr. Kort's undertakings and consent and by our directions.

We note the acknowledgment by the company that witnesses summonsed by the union are not only entitled to attend the Board hearings they are summonsed to attend, they are legally obligated to so attend. We note also the company's undertaking that no reprisals or action of any sort whatsoever will be taken against employees summonsed by the union to attend Board proceedings. The company also agrees to remove and expunge all the disciplinary or other action taken against the grievors in this proceeding relating to the events that have been pleaded before us and that form part of the instant complaint.

The Board notes that section 80(1) of the *Labour Relations Act* reads as follows:

80.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

The Board is vigilant to ensure that employees or individuals summonsed to attend at Board proceedings are freely able to do so as required by law. Indeed, their failure to attend can lead to action against them, including fines and/or imprisonment. Witnesses properly summonsed by the parties, including those summonsed by the union, *must* attend as required by the summons.

Based upon the undertakings and agreement of the company, we direct that

the action taken against the grievors by the company with respect to the matters in question in this complaint be fully and completely removed, cancelled or nullified. The company is directed to take no action against employees of any kind because they have been summonsed by the union to attend Board proceedings.

The Board further directs that copies of this decision be posted by the employer in the work place, where they will come to the attention of employees, and those copies are to remain posted for a period of thirty days from receipt of this decision.

The Board notes that the company agreed that the decision will be posted on all the company notice boards.

On the above basis, this matter is adjourned, to dates to be set by the Registrar, without consultation with the parties. The Registrar is directed to set three further days of hearing.

This panel will remain seized with respect to any problems in implementation with respect to our above directions.

2230-89-R; 3286-89-U Graphic Communications International Union, Local 500M, Applicant v. **Metroland Printing, Publishing & Distributing** and The Mississauga News, Respondents; Graphic Communications International Union, Local 500M, Complainant v. Harlequin Enterprises Limited through its Divisions The Mississauga News and Metroland Printing Publishing and Distributing, Respondent

Related Employer - Unfair Labour Practice - Board not persuaded that decision to implement new technology motivated by anti-union animus - Unfair labour practice complaint dismissed - Board viewing respondents' operations as sufficiently distinct so as to permit, yet sufficiently related so as to warrant, application of related employer provisions of the Act - Mere fact that entities in question not legal or corporate entities not, of itself, precluding application of section 1(4) - Related employer declaration issuing

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

APPEARANCES: *D. A. McKee* and *J. Neilson* for the applicant/complainant; *F. G. Hamilton*, *Vince Johnston* and *Brenda Biller* for the respondents.

DECISION OF THE BOARD; September 25, 1991

1. Metroland Printing Publishing & Distributing (hereinafter referred to as the "production division") and The Mississauga News (hereinafter referred to as the "News") are both divisions of Harlequin Enterprises Limited (hereinafter referred to as "Harlequin"). In Board file the applicant (also referred to as the "union") seeks a declaration pursuant to section 1(4) of the *Labour Relations Act* that the production division and the News constitute one employer for the purposes of the Act. Board File is a section 89 complaint alleging that Harlequin (through its two

divisions which are the subject of the 1(4) application) has violated sections 64, 66, 67 and 70 of the Act. Both matters arise out of the introduction of new equipment at the News.

Background

2. The related employer application was filed on December 8, 1989 and came on for hearing on January 22, 1990 at which time the Board heard argument regarding preliminary matters raised by the respondents. In a decision dated March 22, 1990 the Board dismissed the respondents' motions. The section 89 complaint was filed on March 30, 1990, less than two weeks before the section 1(4) application was next scheduled to come before the Board. When that hearing resumed the union sought to have the two matters consolidated for hearing, a position opposed by the respondents. For reasons delivered orally at the hearing the Board declined to order that the matters be consolidated at that stage of the proceedings but observed that there appeared to be a significant overlap in the evidence required and expressed the hope that the parties would cooperate in expediting the section 89 complaint once it was properly processed and came before a panel of the Board. In the interim this panel heard two days of evidence in the section 1(4) application before the section 89 complaint came before a different panel of the Board on June 12, 1990. In an oral ruling later reduced to writing in a decision dated July 11, 1990, that panel adjourned the section 89 complaint to dates before this panel. When the hearing reconvened we continued to hear evidence in respect of both matters subject only to the respondent's expressed intention, unopposed by the union, to recall John Dean whose evidence had previously been heard.

3. The hearings in these matters commenced on January 22, 1990 and, after 15 days of hearing all set in consultation with the parties, concluded well over a year later. The Board heard the evidence of 10 witnesses, one of whom provided a demonstration of the capabilities of some of the new equipment currently in use at the News. Some fifty-eight documents were filed as exhibits in these proceedings. In coming to its findings of fact the Board has carefully considered all of the evidence before it and taken into account such factors as: the demeanour of the witnesses when giving their evidence, the clarity and consistency of that evidence when tested in cross-examination, the witnesses' ability to recall events and resist the tug of self-interest in shaping their answers, and what seems most probable in all the circumstances. Credibility of witnesses, however, is not a major factor in these matters since, subject perhaps to some exceptions, there do not appear to be many basic factual matters in dispute between the parties. We recognize what may be viewed as the irony in this observation given that the parties felt compelled to call close to fifteen days of evidence before the Board.

The Facts

4. A brief review of the history and current corporate organization of the respondents will be helpful, particularly since even some of the witnesses seemed uncertain or vague about the specifics of the present arrangement. Metroland Printing & Publishing Ltd. was created in July of 1981 through the amalgamation of Metrospan Printing & Publishing Ltd. ("Metrospan") and Inland Publishing Co. Limited ("Inland"). Prior to the amalgamation Metrospan published a number of community newspapers including the News and had a number of production centres including composing room facilities at 3125 and 3145 Wolfedale Rd. Similarly, Inland published a number of community newspapers including The Mississauga Times and had a number of production facilities including a composing room at South Sheridan Way. Subsequent to the amalgamation and by November of 1982 The Mississauga Times ceased production and the remaining composing room work formerly done at the three locations referred to was all moved to the 3145 Wolfedale location which also housed the publication headquarters of the News.

5. The bargaining rights involved in the present matters have their genesis in an applica-

tion for certification filed in August of 1981 and seeking what was essentially a tag end production bargaining unit. We heard some evidence suggesting that there may have been some relationship between the uncertainties arising out of the amalgamation of Metrospan and Inland and the certification drive. Ultimately, on April 14, 1982, a certificate issued in respect of a bargaining unit described, in part, as "all employees of Metroland Printing & Publishing Ltd., employed in the composing rooms at its plant in Mississauga, Ontario...". As already indicated, at the time of the certification there were composing rooms in operation at each of the Wolfedale Road locations; by November of 1982 the 3125 Wolfedale Road composing room had closed leaving only the 3145 Wolfedale Road composing room.

6. A further corporate reorganization took place in January of 1984 when a number of corporations, including Metroland Printing & Publishing Ltd., were amalgamated into Harlequin Enterprises Limited (a pre-existing corporation). However, while as a result of this amalgamation Metroland Printing & Publishing Ltd. ceased to exist as a corporate entity, its name, or at least variations on the name, continue to exist in several important respects. Witnesses invariably used the name "Metroland" to refer to the entire chain of community newspapers and production enterprises formerly carried on by Metroland Printing & Publishing Ltd. Filed in evidence were numerous registrations of business name or style under the *Corporations Information Act* - one for each of the over twenty community newspapers (including the News) formerly part of Metroland Printing & Publishing Ltd. and in addition one for the name "Metroland Printing Publishing & Distributing". Each of these is a registered name of Harlequin and each registration identifies "newspaper publishing" as the business activity to be carried on in or identified by the registered name. The evidence of Mr. Dean was that "Metroland" includes all of the community newspapers and the production operations; Mr. Lenyk testified that his best guess was that the registered style name "Metroland Printing Publishing & Distributing" includes the same operations. Finally, the most current collective agreement relating to the bargaining rights involved in the present matters is perhaps curious in a number of respects. The index page of the agreement is headed:

METROLAND PRINTING, PUBLISHING & DISTRIBUTING

COMPOSING ROOM

GCIU LOCAL 500M UNION AGREEMENT

The agreement itself is styled as:

COMPOSING ROOM AGREEMENT

September 1, 1988 to August 31, 1990

BETWEEN:

THE COMPOSING ROOM, at Mississauga, Ontario, of METROLAND PRINTING, PUBLISHING & DISTRIBUTING.
(hereinafter referred to as the "Employer")

• • •

7. In the recognition clause of the agreement (Article 1.01) the "Employer recognizes the Union as the sole and exclusive bargaining agent for all employees in the Composing Room at its plant in Mississauga, Ontario...".

8. Throughout the lengthy hearings in this matter there was a continuing confusion and

imprecision in names used. For ease of reference and in order to minimize the confusion in a manner which best reflects what appears to be the common parlance we shall use the term "Metroland" to refer to the entire chain of newspapers (including the production division) and shall continue to use the term "production division" as a reference to the first respondent in the related employer application. We note of course that the full name of this respondent corresponds with the registered style or name referred to earlier. In addition, although we heard evidence that every newspaper within the Metroland chain (with the exception of the News and papers from Willowsdale and Etobicoke) has its own composing room, all future references to the "composing room" shall refer to the composing room facility of the Wolfedale plant of the production division where, until the events giving rise to these proceedings, composing work related to the production of the News was carried on.

9. At the time of the application the production division consisted of three plants: Wolfedale in Mississauga doing primarily newspaper work, Tempo in North York doing both newspaper and commercial work, and the Heatset plant in Scarborough doing primarily commercial work. Each of the plants has a plant manager who reports to Hub Foley, the vice-president of Metroland in charge of production and commercial sales. Mr. Foley reports to John Baxter, the president of Metroland. Each of the publishers (some of whom are also vice-presidents of Metroland) of the various Metroland newspapers (including the News) also report to Hub Foley.

10. John Dean has been the plant manager of the Wolfedale operation since 1988. Mr. Dean (and others) testified as to the general business orientation within Metroland. Each plant within the production division and each newspaper within the chain is viewed as a separate and independent profit centre. Mr. Dean's compensation package is a function (to a certain extent) of the profitability of his operations. This can and does lead to situations where different entities within the corporate structure view each other as both client and competitor. The 1990 Wolfedale budget totalled some 24 million dollars of which approximately 19 million dollars derived from newspaper printing, 20-25% related to production of the News. And while it is readily apparent that the News is a significant overall client of the production division, the importance of the News to the Wolfedale composing room is even more dramatic. Up to the events giving rise to these proceedings some 90% of all the work performed in the composing room was related to production of the News. At the same time the separate commercial sales departments within the News and the production division could find themselves competing to attract the same work. Furthermore, while the News was historically one of the production division's largest clients, there was no contractual obligation on the News to continue to have all or most or any of its printing or composing work done through the production division.

11. David Griffin is the general manager of the electronic imaging group of McCutcheon Graphics Inc. (hereinafter "McCutcheon") and has a wealth of experience involving the introduction of electronic technology to the newspaper industry. From 1983 to 1986 he was development manager of the newspaper systems division of Compugraphics, a firm which was responsible for the introduction of the "Intrepid" system at the News in 1986. Intrepid was a PC based system operating in a word processing environment which provided a unique form of "text management" allowing multiple users access to each other's texts as well as the opportunity to merge, share or review text prior to output. The system essentially automated the typing function and some aspects of the composing function and was seen as the first step towards building each and every page of the newspaper electronically. In the spring of 1989, however, Compugraphics announced that it would no longer support any new development of the Intrepid system in the newspaper industry. At this point in time elements of the system had been introduced in the News' classified and (to a limited extent) editorial departments but not in the retail department.

12. In any event, given Compugraphics' announcement, the only options open to the News were to abandon its investment, content itself with the limited stage of the system's development and implementation, or find some other way to develop the system.

13. Mr. Griffin who by this time was no longer with Compugraphics saw the potential of the situation and approached John McCutcheon, president of McCutcheon to suggest that a system he (Griffin) had developed for newspapers in the U.S. could be used to further develop the Intrepid system. They decided to work together to realize the market opportunity and with that in mind subsequently contacted the News.

14. Ron Lenyk is the publisher of the News and a vice-president of Metroland. He too described the Metroland business orientation and perhaps best summed up the Metroland entrepreneurial culture when he testified that his role as a publisher is to "derive the most profit I can from the Mississauga market and contribute that profit to the corporation so we can stay a viable portion of Torstar [Harlequin's corporate parent]".

15. In the fall of 1989 Mr. Lenyk was contacted by the Toronto sales manager of McCutcheon while at the same time John McCutcheon contacted John Baxter, president of Metroland. Both contacts were made with a view to McCutcheon's proposal to update the abandoned Intrepid system. A series of meetings and correspondence followed involving both Mr. Lenyk and Mr. Baxter and culminated late in November with an agreement to purchase equipment and training services from McCutcheon at a cost of approximately \$800,000.

16. Before reviewing the basis, process and impact of the decision it will be useful to briefly review budgeting and expenditure procedures at both the News and the production division. As we have already seen both the News and the production division are ultimately accountable to the same Metroland executives (normally Mr. Foley; however, in view of Mr. Foley's protracted illness during much of the relevant period, it would appear that Mr. Baxter more directly assumed much of this responsibility). It is perhaps therefore not surprising that the budgeting process exhibits a similar structure. Mr. Lenyk sets his annual operating and capital expenditure budgets in consultation and with the approval of Wayne Zubek, Metroland's vice-president of finance. There are a number of items over which Mr. Lenyk has no control like the rent the News pays to Metroland and the rates the production division will charge for services (including the composing room), all of which are determined by Mr. Zubek. Although there is no formal budget review directly between Mr. Lenyk and Mr. Baxter, Mr. Lenyk was sure that Mr. Baxter would review the budgets.

17. The limits on Mr. Lenyk's autonomy can be seen in other areas as well. For example, although the News maintains its own bank accounts, Mr. Lenyk's cheque signing authority is limited to \$1500. Any expenditure beyond that limit requires Mr. Lenyk to requisition the approval of Metroland who will ultimately issue the cheque, if approved. The News' payroll is prepared and issued by Metroland, a service for which the News is charged.

18. A similar process is in place at the production division. Mr. Zubek, Mr. Foley and Mr. Baxter would all (to varying degrees) be involved in the Wolfedale budget process. Like the News, certain budget items were fixed, such as the rates to be charged to and the anticipated income from the News. A similar payroll system appears to be in place. Mr. Dean did not testify as to the limits on his spending powers.

19. At the time of the decision to accept McCutcheon's proposal to upgrade and revamp the Intrepid system the News' 1990 operating and capital expenditure budgets had already been set and approved. Thus, this decision did not fall within the normal budget decision making process. Given the magnitude of the expenditure, this would not be surprising in any event. The economic

advantages of implementing the system were seen as dramatic. The News would no longer have to purchase composing room services, budgeted at \$1.7 million for 1990, from the production division. This saving would more than offset both the anticipated \$0.5 million expenditure required to hire people in the new positions of marketing assistants to work in conjunction with the upgraded technology and the \$0.8 million capital expenditure itself. Further savings would result from the fact that Mr. Lenyk anticipated Metroland would allow the News to amortize the capital expenditure over a period of ten years with no interest charges. In addition to these economic advantages the new system offered the prospect of significantly reduced turnaround time as well as extended deadlines, both general advantages in newspaper publication and ones of particular value in increasing potential advertising capacity and consequent income. There was no dispute that the system envisioned and ultimately implemented is consistent with technological trends within the industry.

20. In view of the obvious advantages of the system as well as the significant capital cost associated with its implementation, Mr. Lenyk sought the approval of Mr. Baxter (who, it will be recalled, had already been involved in discussions with McCutcheon) for the required expenditure.

21. Although there appeared to be little downside in implementing the system from the News' perspective, the same cannot be said of the production division. Although Mr. Lenyk couldn't confirm the 90% figure, he acknowledged that most of the work performed in the Wolfedale composing room came from the News. He further acknowledged that he knew the decision would therefore have a major impact on the composing room and that this would be obvious to anyone in any position of authority at Metroland. Of course, given the entrepreneurial climate already described, it should not be surprising that the economic position of the production division would be of little immediate concern to Mr. Lenyk. He did acknowledge, however, that to the extent any weighing of the composing room versus the News' budgets were to take place it would be performed by Mr. Zubek or Mr. Baxter.

22. Indeed, in the circumstances, there is little doubt that the decision to implement the new technology was tantamount to a decision to close the composing room. And while it may not have (nor could reasonably be expected to have) been viewed as such by Mr. Lenyk, one would have expected that such a significant decision and the impact it would have on the composing room would have been considered by one or more of the Metroland executives (none of whom testified) who were in a position to evaluate and presumably would have been concerned with the economic positions of both the News and the production division.

23. Although the decision had been taken late in the fall of 1989, there were apparently no visible signs of its impact until March of the following year. The News and the Wolfedale plant of the production division are located in adjacent attached buildings at 3145 and 3125 Wolfedale Rd. Quite apart from that proximity of operations, the composing room is located in the very same building (3145) as the News. On March 13, 1990 Mr. Wayne Moore, the composing room manager, wrote a memo to Mr. Dean advising him that he had learned of plans by the News to install typesetting equipment and processors and asking Mr. Dean to provide clarification.

24. Mr. Dean who was unaware of the News' plans began to make inquiries. He first contacted Mr. Foley who in turn advised that he would contact Mr. Lenyk. When neither of them contacted Mr. Dean who by now was aware that composing room employees were becoming anxious about the matter, he decided to contact Brenda Biller. Ms. Biller has human resources responsibilities for Metroland which appear to include such matters as labour relations, negotiations and pay equity. A meeting was subsequently arranged with Mr. Lenyk where the latter confirmed the arrival of the new system and advised that the News would be doing its own composing room work.

On March 26, 1990 a memorandum signed by Ms. Biller on behalf of Mr. Dean was distributed to composing room staff. It advised that the News had begun installation of a desk top publishing system and that the loss of business would necessitate an as yet undetermined number of layoffs of composing room staff.

25. A further meeting was held involving Mr. Dean, Ms. Biller, Mr. Lenyk and representatives from McCutcheon who described the new operation. Based on that information it was determined that the composing room would close. Mr. Dean at a subsequent regular production meeting (attended by publishers in the Metroland chain, production division representatives, Ms. Biller, and Metroland executives) advised of the pending layoffs and the consequent availability of composing room staff to fill appropriate vacancies within the Metroland operations. This was followed by a written memo dated May 15, 1990 and addressed to many of the same individuals. Although the process was protracted, due in large part to the longer than anticipated training and implementation period associated with the new system at the News, the closure of the composing room was completed by the end of the calendar year with the elimination of some 46 (full and part time) positions.

26. The News' decision to introduce the new system was not the first time that its composing room work (or its equivalent) was done elsewhere than in the production division. As already indicated and under a practice which appears common in the industry, the News was under no continuing obligation to have any of its composing or printing work done by the production division. Thus, we heard evidence that there have been occasions where at least some portions of the News have been printed elsewhere from time to time based on price and sufficiency of turnaround time. No precise figures were advanced and the Board was certainly left with the impression that although a certain number of contrary examples can be identified, the bulk of the News' printing is and has been done by the production division. We also heard evidence about work which might otherwise have been done by the composing room having been contracted out or performed directly by employees of the News. None of this work, however, appears to have emanated from either of the three major departments of the News: editorial, classified, or retail (sometimes referred to as display). Rather this work seems to have emerged from printing and distribution sales or from other small working groups within the News created to solicit more advertising work. Much of this work would include the production of leaflets or flyers (not necessarily to be inserted into the News) or other occasional publications. We heard evidence about a string of groups such as the Metroland Creative Group and the Creative Impact Group many of which were fairly fleeting in duration. It is in relation to this sort of work, however, where the News and the production division could perhaps best be characterized as competitors as both run commercial sales departments (or equivalents) which seek the business of advertisers interested in producing flyers, pamphlets or like materials.

27. Rob Leuschner has been the News' advertising manager since June of 1990 and prior to that was the print and distribution sales manager. He testified that for approximately eight months from September of 1988 to April of 1989 the composing room was used for work on the flyers and inserts his department was producing. There was little question, however, that the composing room's priority was work related to the production of the News (and other actual newspaper publications) and in any event was not the types of products with which Mr. Leuschner was involved. Consequently, some difficulties were encountered in achieving the desired turnaround time and a decision was taken in April of 1989 to contract the work to a graphics company which had undertaken to do the required work in a timely fashion and at an acceptable price. By November of 1989 the volume of work and the amount of money flowing out to the graphics company led to a further decision to employ a full time artist and thus reduce the amount of work required to be sent to the graphics company or the composing room. The artist worked with a MacIntosh PC, a scanner and

a printer all located within the News' print and distribution sales department and was thus able to perform the functions previously accomplished in the composing room. It was not seriously disputed that even prior to November of 1989 the composing room functions (or equivalent) in respect of this aspect of the News' work (i.e. production of flyers, pamphlets or other publications apart from the actual newspaper) were performed in a variety of different fashions: by an outside company, directly by employees of the News or by the composing room. It also appears that the decision to employ a full time artist in November of 1989 was made entirely independently of the plans then crystallizing to upgrade the Intrepid system.

28. Without a doubt the bulk of the evidence called by all parties to these proceedings dealt with comparing the work and functions performed by composing room employees with the work and functions actually or projected to be performed by persons hired by the News as marketing assistants. In view of our ultimate conclusion as to the relevance of this issue to our proceedings and the extent to which it is necessary to determine whether the work of marketing assistants would be bargaining unit work, we now set out a review of that evidence in an abbreviated form.

29. It was in the context of the production of retail or display ads that the parties focused their attention and we shall do the same. Filed in evidence were examples of an ad published in the News as well as a flyer produced by the News' in house artist through his desk top publishing facilities. The ad in question was accompanied by the documents which might typically be submitted to the composing room at the start of the process. We say typically because we were advised that the accompanying documents in this case were not the actual documents submitted to the composing room but rather were prepared after the fact. Although there was some dispute as to how typical the extremely detailed instructions included in these documents were, there was no objection to the Board otherwise receiving them as evidence of the type of information typically provided to the composing room.

30. The process of ad production typically begins with a contact between a (News) salesperson and the client. The client would advise the salesperson of the form and content of the desired ad. This might range in specificity anywhere from the extremes of a camera ready copy of the ad to some fairly vague instructions regarding form and content. Based on these instructions the salesperson would prepare and submit a layout and advertising copy sheets to the composing room. The layout (which in some cases may have been prepared by the client) is essentially a mock up of the ultimate ad prepared to scale. The advertising copy sheets contain more specific instructions regarding the text to be included in the ad. They are structured around a system of numerical keys which correspond to specific sections of the layout. These materials might also include instructions regarding such matters as font selection, type and design of borders within and at the limits of the ad, shading or colour, size of type. Also submitted to the composing room would be any logos, photographs or other graphic material to be included in the ad. Based on all of this information the composing room would prepare a version of the ad ready (subject to the approval of the salesperson and the client) to proceed to the next step in the printing process. This would generally involve up to five separate steps (as necessary) each performed by a different individual within the composing room: markup, typesetting, pasteup, camera, and proofing.

31. There was much conflicting evidence regarding the extent of creative input provided by composing room employees. It would appear that the expectation is that the level of detail included in the material submitted to the composing room would be such as to require minimal subsequent creative input. There was no dispute that the responsibility for creative design, text and graphic selection does not reside in the composing room. It would also appear, however, that the level of detail included in the advertising copy pages and layout submitted in evidence is atypical. Consequently, persons working in the composing room would routinely be faced with lack of pre-

cise instructions regarding such creative matters as size of type, font selection, kerning (the process of adjusting the space between letters to accommodate space restrictions), shading, boldness of type and others. In the face of this lack of precision the response of composing room employees was not uniform. Some would seek further clarification from their supervisor or from the salesperson while others would simply exercise their own judgement and make and implement the creative choices (subject always to the approval of sales and, ultimately, the client). So while composing room employees would not exercise judgement regarding the primary creative choices (basic design, text and graphic material), it would appear that, whether or not formally part of the job description, they would regularly exercise creative judgement in respect of other matters associated with advertising production.

32. The documents filed regarding the production of a flyer by the News' in house artist evidence a comparable but different process. In this case a document resembling the layout (prepared by the customer in this case) and a printing request order form were submitted to the artist by a sales representative. In this case as well the basic design, text and graphics selection are contained in the layout and maintained in the final ad. The finished product does, however, reflect a number of creative choices made by the artist including type selection, shading, borders, and angling. The significant difference, however, is that these choices are realized not through the (mainly) manual and mechanical 5 step process associated with the composing room, but rather are done electronically with the aid of the computer, scanner and printer. From this perspective the technological innovation may be seen as a precursor of the system ultimately established at the News.

33. This brings us to a brief description of the significant aspects of the new system adopted by the News. We should note that the system was in the process of being implemented during the lengthy course of these proceedings. In the circumstances it may be helpful, as the parties did, to refer to both the actual and contemplated implementation of the system.

34. Central to the functioning of the new system was the creation of the new position of marketing assistant. The stated basic purpose of the position is "to support and assist in sales and marketing functions within a specified sales unit including; advertising planning, creative design, booking, billing and client communication". Although we have already described some of the capabilities of the new system, there is one aspect not yet adverted to. In addition to automating many of the functions formerly performed by the composing room, the system effects a corresponding automation of accounting functions. As well as electronically creating and storing advertising material, the system allows for the simultaneous recording of "demographic" information (customer coordinates, accounts, bookings, billings etc.) in relation to each ad and advertiser. This centralization and automation of accounting functions is yet another significant advantage of the new system.

35. In terms of the comparison of the work and job functions of marketing assistants and composing room employees, the following general findings are sufficient for our purposes. The marketing assistant position, both in conception and in the limited practice to date, incorporates many of the functions previously performed by composing room employees. For the most part these functions are performed electronically rather than manually. For example, rather than incorporating or altering the size of a logo to be included in an ad photographically, the marketing assistant performs these tasks using a scanner (for initial entry) and the computer (to alter size). (We did hear evidence that a scanner was used in the composing room, but it was acknowledged that it was not as sophisticated as those used by marketing assistants.) The marketing assistants have access to an electronic library of frequently used logos; the composing room (or at least individual compositors) kept a corresponding hard copy library of logos. Many of the other choices and functions formerly exercised by composing room employees (e.g. choice of type, size of type, kerning,

shading, etc.) are now performed by marketing assistants electronically. Thus, while the significant functions of the composing room have been incorporated into the marketing assistant's duties and while they are required to exercise similar judgement and make comparable choices, they do so using the tools of a technology quite different from that formerly available in the composing room.

36. Some of the evidence we heard would suggest that, at least to date, the functions of the marketing assistants do not significantly differ from those formerly performed in the composing room. Whether or not that is accurate, we are satisfied that the marketing assistant position, at least in its conception, is designed to include more than simply incorporating the composing room functions. It is contemplated that marketing assistants will have more direct and regular contact with clients than the infrequent contact between the composing room and News' clients. It is also projected that marketing assistants will perform certain accounting functions never previously associated with the composing room. There is no doubt that the marketing assistant position is designed to include a "sales" component absent from the work previously done in the composing room.

The Positions of the Parties

37. The submissions of counsel in these matters occupied the better portion of two hearing days. We do not propose to review those submissions in intricate detail and what follows is but a summary of the salient points of counsels' arguments.

38. The respondents assert that the News and the production division are and have always been treated by the parties as separate labour relations entities. The Board should not disturb that. Although it was acknowledged that some of the issues raised as preliminary matters (i.e. whether section 1(4) is available in respect of separate divisions of the same corporate entity) might go to the exercise of the Board's discretion, counsel declined to adopt or repeat the submissions of the different counsel who represented the respondents with respect to the preliminary issues.

39. The respondents pointed us to the following Board observation in *Ethyl Canada, Inc.*, [1982] OLRB Rep. July 998 at paragraph 37:

37. Section 1(4) of the Act deals with situations where the economic activity giving rise to the employment is or can be carried out through more than one legal entity. In such circumstances an alteration in legal form, or a transfer of work from one legal entity to another, can undermine established collective bargaining rights. Section 1(4) ensures that the institutional rights of the trade union and the contractual rights of its members, will attach to a definable commercial activity rather than the particular legal vehicle(s) through which that activity is carried on. Legal form is not permitted to obscure economic and collective bargaining realities. In this respect section 1(4) creates a regime of collective bargaining law which significantly modifies common law notions of privity of contract or the corporate veil. However, while the language of section 1(4) is very broad, the section is not intended to apply in every case which in a general or linguistic sense meets its statutory criteria. The Board has a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully, in light of the circumstances of each case, and labour relations policy considerations.

Based upon this authority it is asserted that an alteration in legal form and a corresponding transfer of work (not merely functions) resulting in the undermining of established collective bargaining rights are conditions precedent to a related employer finding. Alternatively, these are factors the Board should consider in the exercise of its discretion under the section.

40. In the present case, given the history of separation of divisions, there has been no

change in legal form. Further and even assuming the functions to be performed by marketing assistants are comparable to those formerly performed in the composing room, there has been no transfer of work. A transfer in the context of this case would entail the movement of work from the production division to the News, but the production division played absolutely no role in the decision to implement the new system at the News. It is thus impossible to view the News as the recipient of anything from the production division, particularly in view of the fact that the News was under no obligation to have its composing work done by the production division. Even if there has been a transfer, it is not a transfer of work since the work performed by marketing assistants using the new technology is entirely different from composing room work even if there is some overlap in function. The net effect of the introduction of new technology is that work has been eliminated, not transferred.

41. The respondents also argue that in order to succeed, the applicant must prove that the marketing assistant's work is identical to composing room work and that work done exclusively in the composing room bargaining unit has been undermined by the News' innovation. They deny that there has been any attempt at legal manoeuvring to create a new entity for the purpose of avoiding collective bargaining obligations. Finally, the Board should consider the fact that the applicant raised no objection in the years prior to the application regarding News' employees or others doing work which could have been done in the composing room.

42. With respect to the section 89 complaint, the respondents deny any anti-union motive and assert that there is simply no evidence to allow the Board, even by inference and having regard to the reverse onus, to make such a finding. The basis and rationale for the decision to implement the technological change are clearly set out in the evidence and disclose no improper motive.

43. The position of the union, not surprisingly, is different. With respect to the section 1(4) application we were pointed to the language of the statute for the preconditions to any related employer declaration. The legislation (and the cases interpreting it) require that two different entities carry on related or associated activities or businesses under common control or direction. Although such a finding may well be relevant, anti-union animus is not a precondition to relief under the section.

44. In view of the respondents' position on the issue of whether related employer relief is available in the context of separate divisions of the same corporate entity, the union did not add to submissions already made when the Board dealt with the respondents' preliminary motions.

45. We were pointed to the Board's decision in *Stebill Limited*, [1989] OLRB Rep. Apr. 384 for the proposition that the activities of two entities need not be identical to be related or associated within the meaning of the section. Both the News and the composing room are/were involved in the production of the News. Furthermore, there is a sufficient nexus or relationship between the work of marketing assistants and that previously performed in the composing room to allow the Board to conclude that the two entities carry on associated or related activities or businesses. In this context we were invited to focus on the functions and not necessarily the technology used to perform those functions by the two groups of employees. An actual and specific transfer of identical work is not a precondition to the application of the section. It was asserted that the evidence supported the conclusion that the current technological innovation and the resulting marketing assistants' positions is merely part of the evolution of the compositor function. There is such a strong overlap between the core functions of marketing assistants and composing room employees that (but for the different employer) the former would be found to be doing bargaining unit work under the terms of the composing room collective agreement. In this context we were referred to a number of arbitration cases dealing with issues of bargaining unit work.

46. The union relied on, *inter alia*, *McCollum Graphics Incorporated*, [1986] OLRB Rep. Jan. 131 in support of its arguments regarding common control or direction. In that case the Board observed at paragraph 21:

Common control or direction over two corporate entities is generally demonstrated by showing that the two corporations have common shareholders and officers. However, the Board has in a number of cases held that two corporations can be under common direction even though legally owned by different individuals....While in these and certain other cases, the Board has indicated that it will look beyond mere ownership to ascertain who, in fact, directs or controls activities that give rise to employment, it has also indicated that the type of control involved must involve a real ability to "call the shots", as opposed to acting under the direction of more senior officials within the organization.

47. In reviewing the evidence, the union argued that the real control, the ability to "call the shots" in relation to both the News and the composing room was to be found in the same individuals, the senior executives of Metroland. The budgets of the two entities were subject to approval by common individuals. Whatever Mr. Lenyk's contribution to the decision to purchase the new technology, his spending authority is limited to \$1500 and the ultimate decision was made by Mr. Baxter. The fact that neither Mr. Lenyk nor Mr. Dean have any real control over their budgets is highlighted by the fact that not long before the new technology was contemplated at the News, Mr. Dean saw proposals to purchase comparable (but admittedly not as sophisticated or extensive) equipment for the composing room rejected in the budgeting process monitored by Mr. Zubek and, ultimately, Mr. Baxter. It was logical and, as Mr. Lenyk conceded in his cross-examination, a safe assumption that any weighing of relative costs and benefits as between the News and the composing room would be performed by Messrs. Zubek and Baxter.

48. Finally with respect to the section 1(4) application, a number of other points raised by the respondents did not go to the essential ingredients of a related employer application. Although some of these might be relevant to the exercise of the Board's discretion under the section, they should not prevent the Board from issuing the declaration sought. These included the respondents' submission that the union was aware for some period of time that the News, through its various "creative" groups, was doing work similar to that in the composing room. No grievance or complaint was ever filed prior to the instant proceedings. The respondents had also argued that a related employer declaration and consequent relief could impact on other bargaining units represented by the applicant and another union.

49. With respect to the section 89 complaint the union acknowledges that the central issue is motive. While it concedes that there may have been a legitimate business justification for the introduction of the new technology, it asserts that, in view of the reverse onus, the respondents have an obligation to adduce evidence to negate any improper motive. The real decisionmaker in the case was Mr. Baxter and his failure to testify leaves too many questions about the respondents' real motive unanswered and should lead the Board to conclude that the respondents have failed to discharge their obligation in the section 89 proceeding.

Decision

50. We shall deal first with the section 89 complaint. The union alleges that the respondent has violated sections 64, 66, 67 and 70 of the Act. These sections provide as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to

deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargaining with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

51. It was common ground that in order for this complaint to succeed the Board must be persuaded (whether through the respondents' failure to meet the reverse onus or otherwise) that the decision to implement the new technology was motivated, at least in part, by anti-union animus. Although we might have been painted a more complete picture of the decision making process had Mr. Baxter (and, indeed, other Metroland executives) testified in these proceedings, we are not persuaded that this is sufficient, in the circumstances, to impel us to conclude that there has been a violation of the Act.

52. We have already set out our factual findings on this point; we are satisfied that there was more than sufficient economic justification for the introduction of the new system whose myriad benefits and attractions have been outlined earlier. Even without Mr. Baxter's evidence we are satisfied that the various capabilities and advantages of the new system were the real reason for its introduction. This is consistent with general technological trends within the industry. We note as well that the union did not argue that even accepting the legitimacy of the introduction of the new technology (and presumably assuming the success of the section 1(4) application) that the decision to introduce the equipment at the News rather than in the composing room was improperly motivated.

53. In these circumstances there is simply no basis for finding the improper motive which all parties agreed was necessary for the success of this complaint.

54. The section 89 complaint is consequently dismissed.

55. Disposition of the related employer application is somewhat more complicated. Section 1(4) of the Act provides:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

56. While the Board's authority under the section is clearly discretionary, the essential ingredients necessary to found a related employer application are those enumerated in the statute as the Board has observed in many cases including *Radio Shack*, [1979] OLRB Rep. July 689 at paragraph 7:

... Section 1(4) of the Act is designed to deal with situations where more than one legal entity carries on related business or activities under common control and direction and where "it may not make industrial relations sense to allow the legal form to dictate and possibly fragment the collective bargaining structure." There are three conditions which must be met before the section can be applied.

- (a) There must be more than one corporation, firm or individual[,] association or syndicate involved.
- (b) These entities must be under common control or direction, and
- (c) they must be engaged in associated or related business activities.

If these conditions are met the Board is given a discretion under the statute to make a declaration that the entities in question constitute one employer for the purposes of the Act. The Board has consistently exercised its discretion under section 1(4) to preserve rather than to extend bargaining rights.

57. In view of the words of the statute and the Board decisions interpreting it, we are simply unable to accept the respondents' argument that an alteration of legal form, a transfer of work from one entity to another and a resulting undermining of collective bargaining rights are all conditions precedent to a related employer finding (on the point regarding alteration of legal form, the words "whether or not simultaneously" found in the statute are obviously relevant). Similarly we do not agree that establishing an identity of work performed as between the entities in question is a prerequisite to finding the statutory requirements have been met. While all these factors may well be ones the Board may wish to consider in determining whether or how to exercise its discretion, they simply are not matters directly relevant to determining whether the essential statutory ingredients have been established. We move then to a consideration of whether the respondents are related employers under the terms of section 1(4) and leave any issues regarding our discretion to be dealt with later as necessary.

58. Apart from the submissions just adverted to, the respondents did not seriously challenge the contention that the News and the composing room carry on related or associated activities. And although the union pointed to what it asserts are significant overlaps in the core functions of marketing assistants and compositors to bolster its claim that the composing room and the News

carry on related or associated activities, we were also directed to authorities (like *Stebill Limited, supra*) which indicate that the activities of the entities in question need not be identical in order to be related or associated. In the circumstances we are satisfied that the functions and work performed in the composing room are related or associated with the business or activities of the News, i.e. production of the newspaper.

59. It was the question of whether the entities are under common control or direction which was most seriously challenged by the respondents. The *McCollum Graphics* case, *supra*, speaks of common shareholders and ownership as a principal indicator of common control or direction. If that were the exclusive test it would readily be met in a situation such as the instant one involving different divisions of the same corporate entity. Yet one could imagine that such a degree of independence and autonomy could exist in such a situation as to preclude a finding of common control and direction. Indeed, the respondents argue that is precisely the case here.

60. Given the nature of the organizational structure it is perhaps not surprising to find many indicators of common control and direction present. The prices the News is to pay and the composing room are to receive for composing room work are set by Mr. Zubek. It is perhaps somewhat curious that monthly accountings of all composing room work (i.e. not limited to the News) are sent to three individuals at the News, including Mr. Lenyk. Paycheques at both enterprises are drawn and paid on Metroland accounts. Mr. Lenyk and Mr. Dean attend regular monthly production meetings with other Metroland publishers, production division representatives, Metroland executives and human resources personnel. The composing room was operated in the very same premises which house the News. Although we heard evidence that the News pays rent to Metroland for use of its facilities, we heard little other evidence as to ownership and charges for facilities paid or received by either the News, the production division, or the composing room. Yet despite the physical proximity of the operations, we are satisfied that the day to day operations and management of the News and the production division are, for the most part, separate and autonomous. It is, however, in relation to many of the events giving rise to these proceedings that the common control or direction of the enterprises becomes evident.

61. There is little question that ultimate financial control resides in the hands of the same individuals. And while decisions made or recommended by either Mr. Lenyk or Mr. Dean are no doubt premised on the economic health and viability of their particular corners within the Metroland patchwork, there is no reason to believe that the perspective of the Metroland executives who must ultimately approve or reject significant economic proposals is similarly limited.

62. In this context we see that the real economic decision making power of Mr. Lenyk and Mr. Dean is somewhat limited. In concrete terms, Mr. Lenyk's spending power is limited to \$1500. Expenditures beyond that amount must be approved by Metroland executives and, assuming such approval, the required funds (although apparently ultimately charged to the News) come from Metroland or Harlequin accounts. The capital expenditure budgets of both men are subject to approval by (the same) others. Perhaps most significant, however, is the fact that the (albeit comparatively modest) proposals to introduce desk top publishing technology into the composing room which originated with Mr. Moore were rejected by the same individual(s) who ultimately approved the decision to introduce the new system at the News. Furthermore there can be no doubt that the decision to introduce the new system at the News was tantamount, from the perspectives of the Metroland executives, to a decision to close the composing room. Whether or not that was the specific intent in making the decision, its impact in this regard could not have escaped the decision makers.

63. We note that we were invited by the union to draw negative inferences from the failure

of either Mr. Foley, Mr. Zubek or Mr. Baxter to testify. Although there may be some basis for the invitation and although the Board may have benefitted from the evidence of these individuals, we have not found it necessary to draw the suggested inferences as we are satisfied that the evidence before the Board adequately supports the factual conclusions we have drawn.

64. Finally with respect to the issue of common control and direction we note as well that the industrial relations functions of the enterprises appear to be centralized at least to the extent that they are serviced by the same human resources personnel. In this context we note that Brenda Biller of Metroland's human resources department has been an active player in many of these events. She appears to have been involved in collective bargaining negotiations for the composing room and grievances involving both the composing room and the News. She was responsible for several memos to composing room employees and was the recipient of at least one memo from McCutcheon regarding implementation difficulties associated with the new system at the News.

65. Although there may be some significant differences which we shall examine later, we are of the view that at least the general thrust of the following observations found at paragraph 9 the *Radio Shack* case, *supra*, are applicable to the present case:

... Work which was previously done by one arm of the Tandy organization is now being done by another arm of the Tandy organization at the same location and with some of the same employees. Although the change was made for sound business reasons and was not in any way motivated by a desire to oust the representation rights of the trade union in respect of the employees performing the work in question, the effect has been to remove these employees from the union's recognition. Section 1(4) of the Act was designed to protect bargaining rights which are threatened by non-arm's length restructuring as in the instant case. Employees who have been represented by a trade union should not be left unrepresented as the result of a corporate reorganization, regardless of the motives for the reorganization.

The Board is satisfied that the respondents' activities are carried on under common control or direction.

66. This brings us to a consideration of whether the respondents' activities are carried on "by or through more than one corporation, individual, firm, syndicate or association or any combination thereof". Despite the parties' reticence on this point in final argument, we feel compelled to deal with it since it was the subject of a preliminary motion. And, although dismissed, the substance of the motion styled "jurisdictional" was not resolved. Further, while counsel for the respondents explicitly declined to repeat or adopt the submissions made on the preliminary point, neither did he withdraw them.

67. The issue was dealt with as follows in our preliminary decision in this matter:

7. The respondents, based on the evidence currently before the Board, argue that no declaration under 1(4) can issue in the present case since the first condition referred in the *Radio Shack* case can not be met. The respondents, argue that as they are both divisions of the same corporate entity, namely Harlequin, there is therefore not "more than one corporation, individual, firm, syndicate or association or any combination thereof". Essentially, argue the respondents, there is already only one entity and the Board is therefore without jurisdiction to make the order requested.
8. The union argues that the statute does not require two separate corporate persons before 1(4) can apply. Indeed, it is not even necessary for two entities of separate legal personality (corporate or otherwise) to exist as a precondition to the application of section 1(4). The wording of the section and in particular the taxonomy of entities contained therein are, according to the union, deliberately vague. While individuals and corporations may be seen as recognized legal entities, the terms "firm", "syndi-

cate” and “association” cannot and are not otherwise defined in the statute. This vagueness, it is asserted, is necessary to effect the labour relations purpose of the section.

9. In the context of the argument regarding the applicability of section 1(4), the union extended an invitation to the respondents. The union expressed its concern that while the respondents in the present application take the position that they are divisions of the same legal entity, they may all the same rely on their distinctness as a defence in the arbitration proceedings arising from the grievance. The scope clause of the collective agreement defines the bargaining unit as including “... all employees in the composing room...”. If the respondents were prepared to undertake not to rely on their separate status to argue at arbitration that an employee of The News cannot be covered by the agreement with Metroland then the union indicated the present application would not need to be pursued. The respondents did not accept the invitation.
10. A number of cases were referred to in support of the parties’ positions on the motion(s) currently before the Board including *General Bakeries Limited*, [1979] OLRB Rep. May 400; *Radio Shack*, *supra*; *George Hamers Limited*, [1981] OLRB Rep. Oct. 1382; *General Motors of Canada Limited*, [1986] OLRB Rep. Feb. 244; and *Masstron Scale Ltd.*, [1987] OLRB Rep. Nov. 1578.
11. The respondents relied principally on the *General Motors* case. In this case the union had been certified in respect of a single plant. In the certification proceedings the employer had unsuccessfully argued that the bargaining unit ought to include employees working throughout the municipality. Several years later, when the employer took over an existing facility in another location in the municipality, the union applied under section 1(4) for a declaration that the respondents (two separate plants) were one employer and a further declaration that the newly acquired plant was subject to the terms of the existing collective agreement.
12. In dismissing the union’s application the Board, at paragraph 7, made the following observation:

In our view, the clear purpose behind section 1(4) is to enable the Board to “pierce the corporate veil” and to treat what would otherwise be separate legal employers as one employer. In the instant case, we have only one legal entity before us, namely General Motors of Canada Limited, which is already a single employer. In these circumstances, we are satisfied that section 1(4) cannot be applicable to the facts of this case.

In a similar vein, the Board in *General Bakeries Limited*, *supra* held that an application under 1(4) could not succeed where the respondents were separate divisions of the same corporate entity and did not have separate legal personality.

13. Notwithstanding the above the Board has, in *Radio Shack*, *supra*, applied section 1(4) to divisions of the same corporation. Similarly, in *George Hamers Ltd.*, *supra*, the Board concluded (at paragraph 12) that “... whether a segment of a corporation’s business, designated by it as a division, is to be treated as a legal entity or not is a question of fact in each case.”
14. To the extent that there may be inconsistencies in the cases referred to the Board has determined that it is neither necessary nor advisable to deal definitively with these at this stage of the proceedings. It may well be, as counsel for the applicant suggests, that the focus on *legal* entities has been overemphasized and the cases ought not to be read outside of the factual circumstances in which they arise. Counsel noted that the Act does not refer to *legal* entities. It may be more sensible to describe the taxonomy contained in section 1(4) as “labour relations entities” which may not always coincide, strictly speaking, with “legal” entities. It is the purpose of the section, namely to preserve (and not to extend) bargaining rights which must guide any interpretation of the section.

15. In any event, whether we are concerned with legal entities or labour relations entities we agree that whether such entities should be viewed as separate entities for the purpose of section 1(4) is a question of fact in each case. In the present case this is not a determination the Board feels should be made at this stage in the proceedings and in the absence of a complete evidentiary framework.
16. Consequently, to the extent that the respondent's motion is made pursuant to Rule 71, the Board declines to exercise its discretion to dismiss the application at this stage of the proceedings. To the extent that the respondents' motion is an objection to our jurisdiction to make the order requested, the motion is dismissed. The Board's jurisdiction in this context is, *inter alia*, to determine whether the respondents are separate entities as contemplated by section 1(4) of the Act. If they are not, the application will be dismissed. This is a determination to be made with the benefit of all the relevant evidence.
17. The respondents will, of course, be free to renew all their arguments (whether directed at the conditions precedent to the application of section 1(4) or to the issue of the exercise of the Board's discretion) at the conclusion of the case.

68. In reviewing our prior decision and the arguments made and authorities cited in relation to the preliminary motions, we are struck that there is some limited merit to the position articulated by the employer at that time. Whether we are concerned with employees of the composing room, the production division, the News or, indeed, any of the community newspapers in the Metroland chain, there is only one corporate employer entity involved - Harlequin. And while the parties may have chosen to name some entity other than Harlequin and without legal personality as the employer party to the collective agreement(s) before us, this cannot change the fact that the legal entity ultimately bound and liable for any breaches of the agreement remains Harlequin. We seriously doubt that any arbitrator or court called upon to enforce an arbitrator's award would allow Harlequin to escape liability for a breach of the agreement merely because the parties chose to name Metroland or the News rather than Harlequin as the party bound by the agreement. This is, of course, an issue entirely distinct from the scope of the union's bargaining rights as defined in a certificate and, ultimately, in a collective agreement. Parties are obviously free to limit the scope of a union's bargaining rights to a particular division of a corporate entity. In those circumstances the fact that the legal entity is larger than the division to which bargaining rights are limited will not of itself serve to expand the limits on bargaining rights agreed to by the parties.

69. These observations highlight the significance of the "invitation" made by the union and referred to in paragraph 9 above of our earlier decision in this matter. As indicated the employer declined to accept the union's invitation. In view of our current observations, had any of the parties requested that the matter be dealt with on this basis, the Board might seriously have entertained a request for a declaration that (quite apart from any questions involving the interpretation of the scope of the collective agreement) Harlequin, as *the* legal entity involved in the operations of the composing room and the News, is a party to the collective agreement with the union. As will become clear, that result might have been similar to the one we have arrived at, but might have obviated the significant delay and expense associated with these proceedings. However, none of the parties argued the matter on that basis, but rather chose to deal with the matter exclusively and explicitly under the rubric of section 1(4). Consequently, we must now decide whether section 1(4) relief is available in these circumstances.

70. Upon reviewing the cases referred to we are satisfied that the respondents are separate entities as contemplated by section 1(4) of the Act. We note that the *General Bakeries* case arose out of the purchase and amalgamation of a non-unionized employer by a unionized company. The Board was satisfied that the arbitration process was adequate to protect the union's rights. In a similar vein, the *General Motors of Canada* case involved what was little more than a naked

attempt by the union to expand the geographic scope of its bargaining rights (after insisting, at the certification hearing, that bargaining rights be limited to a single plant location). Thus, while we cannot quarrel with the results in either of these cases, we think it would be wrong to interpret them as establishing any rigid rule limiting the application of section 1(4) to separate legal entities. Rather we think there may be situations such as the one described in the excerpt from *Radio Shack*, supra, which typify the mischief towards which section 1(4) of the Act is directed and thereby clearly warrant its application. We thus adopt and adapt the words cited from the *George Hamers Ltd.* case and conclude that whether a segment of a corporation's business, designated by it as a division, is to be treated as a labour relations entity as contemplated by and capable of warranting the application of section 1(4) of the Act is a question of fact in each case. Additionally, there may be aspects of the particular arrangement in each case which may influence whether and how the Board exercises its discretion under the section. The mere fact, however, that the entities in question are not legal or corporate entities does not, of itself, preclude the application of the section.

71. In the present case the respondents argued quite forcefully that they are separate labour relations entities and should continue to be treated as such. While this argument may be more significant in relation to the exercise of the Board's discretion, it helps to highlight our conclusion. Essentially we are of the view that the respondents' operations are sufficiently distinct so as to permit, yet sufficiently related or associated so as to warrant (subject to arguments regarding our discretion) the application of the related employer provisions of the Act.

72. Nothing in this, or any other aspect of this decision, should be viewed or interpreted as a departure from the Board's stated preference, which we affirm, that employer respondents in certification applications remain the legal entity or corporation rather than any subdivision thereof. Where parties explicitly agree to limit bargaining rights to a particular corporate division this can be effected by the appropriate bargaining unit description without altering the name of the legal entity which is the employer party to the collective bargaining relationship (see *Beatrice Foods (Ontario) Limited*, [1982] OLRB Rep. June 815). Indeed, had the parties to the present application previously turned their minds to this point they may have avoided the need for the present lengthy litigation.

73. As we are therefore satisfied that the essential ingredients necessary for a related employer finding have been established, we now go on to consider a number of factors which may influence the exercise of our discretion.

74. The question which occupied the bulk of the parties' evidence and submissions was the relationship between the work and functions of marketing assistants and composing room employees. The respondents assert that unless it is established that the work of the marketing assistants is work which (but for it being performed for the News) would fall exclusively within the scope of the composing room collective agreement, no relief should issue. The union maintains that so long as we are satisfied that there is a significant overlap in the core functions of the two groups we should provide the requested relief.

75. The respondents rely on Board decisions such as *Dominion Stores Limited*, [1979] OLRB Rep. June 506 and *Valdi Inc.*, [1979] OLRB Rep. Aug. 833. In both cases the Board declined to grant the relief sought since it was of the view that the work in question (operation of gasoline service stations and a "limited assortment" discount outlet) did not fall within the defined scope of existing bargaining rights which the Board found covered retail food supermarkets.

76. Clearly, there is extremely limited utility to a related employer declaration if the work in question does not fall within the scope of the applicant's bargaining rights. In this context it is

understandable that the Board may decline to exercise its discretion in such a case. We should not lose sight, however, of the fact that the determination of what constitutes bargaining unit work is not the primary inquiry in a related employer application. Furthermore, such a determination, as the facts of the present case tend to highlight, may not be as simple and straightforward as the cases just referred to may suggest. That is why the Board may not always finally determine the question of the scope of bargaining rights, which, by its very nature, is one more appropriately determined by a Board of Arbitration in accordance with the relevant collective agreement and the Act.

77. In *Brink's Canada Limited*, [1987] OLRB Rep. May 647 the respondents argued that the Board should not exercise its discretion since the work performed by the employees of the entity sought to be brought within the collective agreement was vastly different from that performed under the agreement and, consequently, only an ancillary portion of the work performed by the affected employees would be captured within the applicant's bargaining rights. The union in that case asserted that the determination of the scope of the applicant's bargaining rights was a matter for arbitration under the agreement:

... The applicant believed, *probably correctly*, that an arbitrator would not deal with the issue of whether ATM was a related employer bound to the Toronto Truck Agreement and, unless ATM could be shown to be bound to the agreement, the arbitrator would not be able to make any orders with respect to that company.

[at paragraph 31, emphasis added]

The Board ultimately allowed the application but left questions regarding the extent and manner of the application of the collective agreement to the parties (or, if necessary, an arbitrator) to resolve.

78. Section 1(4) is designed to insure the stability of bargaining rights and to prevent the obfuscation of economic and labour relations realities which may (intentionally or not) result from the structure and organization of entities not operating at arm's length. A major decision was made to implement new technology. The persons ultimately responsible for taking that decision could have decided to implement the system in the composing room rather than the News. Had the system been introduced directly into the composing room, the applicant would have been able to claim the resulting work and, if disputed, have the matter determined by arbitration. Although the issue at arbitration might have been more complicated had the system been introduced not in the composing room but elsewhere within the Wolfedale facilities, the result, at least in terms of access to arbitration, would have been similar. Is the applicant to be precluded from making its claim and ultimately having it adjudicated, if necessary, only because the system was introduced into the premises of a related employer? We think not. Were we satisfied that the work performed by marketing assistants bears no relation to that previously done in the composing room, we might have been persuaded to refrain from exercising our discretion.

79. The respondents also point to what they claim is the applicant's delay in bringing the application as a factor which should cause us to deny relief. In this regard reliance is placed on the fact that the News has previously contracted out composing room work, has previously done some composing room work in-house (through the "creative" groups) and has periodically employed composing room employees outside their employment in the production division and all this without any complaint by the union. First of all we fail to see why the fact that work may have been legitimately contracted out to an entity operating at arm's length should affect our decision (see *Cronkwright Transport Limited*, [1990] OLRB Rep. July 768). It was not entirely evident to us that work performed "directly" by composing room employees might not fall in this category as well. In any event the remaining instances relied upon are simply so sporadic and marginal so as to pale in

significance in the face of the events giving rise to the present litigation. More important, however, is the fact that there is absolutely no prejudice claimed to have inured to the respondents as a consequence of the claimed delay. This is not a case where the respondent has entered into onerous contractual obligations on the basis of representations that the applicant would not enforce its bargaining rights. Neither was there any suggestion that the applicant had abandoned those rights. To the extent that delay may be relevant, we simply are unpersuaded that the delay, such as it is in the present case, ought to prevent us from exercising our discretion.

80. The respondents have other bargaining units (represented by this applicant and at least one other bargaining agent). Concern was expressed about the impact related employer relief might have on those other units. In this context and in view of the position of the applicant on this point, we are prepared to limit our relief accordingly.

81. The applicant has held the bargaining rights in question for nearly a decade. Almost all other newspapers within the Metroland chain had their own composing rooms. Not so the News. Its composing work was performed in the composing room which, although part of the production division, was located in a portion of the building which otherwise houses the News. The News became the composing room's principal client. But the relationship between the two was different from the traditional business-client relationship. The decision to implement new technology at the News was, effectively, a decision to cease the operations of the composing room. Newly hired employees at the News continue to perform functions previously performed in the composing room. In these circumstances we do not believe that the union ought to be entirely precluded from even asserting its claim merely because the system was implemented at the News rather than in the composing room or elsewhere within the production division.

82. Having found that the respondents are carrying on associated or related activities under common control or direction we hereby direct that, for the purposes of the Act and the union's bargaining rights as currently reflected in the composing room collective agreement, they be treated as constituting one employer. We further declare that the News is bound to the composing room collective agreement as if it had been a party thereto.

2173-86-R Service Employees Union, Local 478, Applicant v. Northern Communications Services Ltd., Respondent

Certification - Constitutional Law - Reconsideration - Five years after certification, employer seeking reconsideration of Board's decision to certify on ground that employer's business a federal work or undertaking - Matter not raised at appropriate time - Reconsideration application dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; September 10, 1991

1. This is a request for reconsideration of our decision of November 18, 1986 in which the applicant was certified. The request reads as follows:

We have recently been retained by Northern Communications Services Limited. We have been instructed to ask the Board to reconsider its decision to certify the Service Employees International Union, in Board File No. 2173-86-R.

It is our position that the Board was without jurisdiction to certify the union since Northern Communications Services Limited is engaged in radio communications, a work or undertaking which falls within federal jurisdiction. Accordingly the Board had no jurisdiction to entertain the application.

We acknowledge that a considerable period of time has passed since the original decision, however, since our request for reconsideration is based on an error of law which goes to the constitutional jurisdiction of the Board we submit that the Board should exercise its discretion in this matter to reconsider.

2. We note that the respondent company participated in the certification application at the time, and this issue was not raised. It has not been raised before now. It is a reasonable inference that during the (approximately) five year interval between the certificate issuing and the request for reconsideration, the respondent has bargained with and otherwise dealt with the union.

3. This matter was not raised at the appropriate time, although it could have been, and five years have now passed. In the circumstances, we decline to reconsider our decision.

3458-90-R International Union of Operating Engineers, Local 793, Applicant v. Port Weller Dry Docks, A division of Canadian Ship Building and Engineering Ltd., Respondent v. International Brotherhood of Boilermakers Local 680, Intervener #1 v. I.B.E.W. Local Union 303, Intervener #2

Bargaining Unit - Certification - Construction Industry - Operating Engineers union seeking to carve out its traditional bargaining unit in displacement application - Board satisfied that business of repairing or building ships in dry docks not constituting business in construction industry - Application withdrawn with leave

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

APPEARANCES: *Jack J. Slaughter, James Anderson, Glyn Allman, Matt Kellway* for the applicant; *Robert Goheen* for the respondent; *James Hayes, Michael Blazer, David Brown* and *Michael Simons* for the intervener.

DECISION OF THE BOARD; September 9, 1991

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The applicant Operating Engineers seeks its traditional craft bargaining unit in this displacement certification application. In support of its request, that it not be required to apply for the existing bargaining unit, the applicant asserts that the respondent is engaged in operating a business in the construction industry, and therefore the applicant is entitled to its traditional construction industry bargaining unit. The intervener, Boilermakers Local 680, has long had a bar-

gaining relationship with the respondent employer, and pursuant to a series of collective agreements has represented, with some exceptions, an "all employee" bargaining unit.

3. The parties agreed on the facts with respect to the issue of whether the respondent operates a business in the construction industry. Simply put, the respondent is in the business of building and repairing ships in dry dock. It uses a work force consisting of numerous trades, including licenced hoisting engineers who operate the gantry and mobile cranes. The licenced engineers do not operate the other cranes utilized in the respondent's business.

4. The applicant submitted that the business of the respondent falls within the meaning of the definition of "construction industry" in the Act, and further, that a recent amendment to the *Occupational Health and Safety Act* (Bill 208, Chapter 7, Statutes of Ontario, 1990, section 1(6)) supports the view that shipbuilding is now "construction" within the meaning of the *Labour Relations Act*. More specifically, the amendment to the *Occupational Health and Safety Act* indicates that for purposes of that Act and its regulations, a ship being manufactured or under repair is deemed to be a "project". A "project" is defined in that Act as a construction project. The applicant submits that this indicates a legislative intention that, for purposes of the *Labour Relations Act* as well, shipbuilding is considered part of the construction industry.

5. The Board orally ruled that the respondent was not engaged in a business in the construction industry. Notwithstanding the recent amendments to the *Occupational Health and Safety Act*, the Board's task was still to determine (where appropriate) the meaning of "construction industry", and other relevant provisions, within the meaning of the *Labour Relations Act*, and to determine whether a particular business was a business in the construction industry under the *Labour Relations Act*. The Board was satisfied that the business of repairing or building ships in dry docks does not constitute a business in the construction industry. If it were otherwise, then the operation of cranes with respect to numerous industrial endeavours would also constitute construction industry work; for example, on the applicant's argument, the operation of cranes to move materials used to build automobiles would also constitute a construction industry business. We did not find that such activity makes this construction work. The Board therefore ruled that the work in question was not construction industry work.

6. In light of the Board's ruling, the applicant sought leave to withdraw its application. This application is accordingly withdrawn with leave.

1605-91-FC Labourers International Union of North America, Local 1036, Applicant v. The Corporation of the City of Sault Ste. Marie, Respondent

Construction Industry - First Contract Arbitration - Labourers certified in 1987 - Municipal employer advising union that it did not intend to hire labourers under the Labourers' collective agreement, but intended rather to assign work of construction labourers to CUPE members - City also refusing to include subcontracting clauses proposed by Labourers - Employer position rendering Labourers' bargaining rights virtually meaningless - Board finding that employer refusing to recognize the bargaining authority of the trade union - First contract arbitration directed

BEFORE: Ken Petryshen, Vice-Chair, and Board Members M. M. Vukobrat and P. V. Grasso.

APPEARANCES: *S. B. D. Wahl* and *William Suppa* for the applicant; *Roy Bernardi*, *Terry Ackland* and *Lorie Bottos* for the respondent.

DECISION OF THE BOARD; September 9, 1991

1. This is an application for a direction that a first collective agreement be settled by arbitration, pursuant to section 40a of the *Labour Relations Act*.

2. This application was made on August 9, 1991 and heard on August 28, 1991 in Sault Ste. Marie. At the hearing, the parties advised the Board that, in essence, only one issue stood in the way of concluding a collective agreement. We were advised that there were a few other issues outstanding; however, the parties did not anticipate any difficulty in resolving them. In fact, during the course of a brief recess during the morning, the parties were able to resolve these matters with the result that only one issue kept them apart. The one issue which continued to separate the parties concerned whether the collective agreement would contain a subcontracting provision.

3. The materials filed by the parties disclosed that there was very little disagreement on the facts. The applicant, the Labourers' Union of North America, Local 1036 ("the Labourers"), called one witness to testify in support of the application. The Corporation of the City of Sault Ste. Marie ("the City") elected to call no evidence. The evidence of Bill Suppa, the Labourers' Business Manager, had the effect of restating the parties' positions rather than disclosing any significant factual dispute. Given the narrow issue to be determined, the nature of the materials filed and the brief *viva voce* evidence that was called, the Board was able to complete the hearing in one day.

4. Although the issue separating the parties is rather narrow, it is useful to briefly review the history of the bargaining relationship. By application for certification dated June 25, 1987, the Labourers applied for certification for construction labourers in the employ of the City in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and construction labourers in all other sectors of the construction industry in OLRB geographic Area #21, save and except non-working foremen and persons above the rank of non-working foreman. The bargaining unit consisted of approximately nine employees employed in connection with the construction of the Salmonid Fish Hatchery in the City. (We note that the Board also had before it an intervener's application for certification by the Carpenters' Union.) In its reply to the application, one of the positions the City took was that the Canadian Union of Public Employees, Local No. 3 ("CUPE") was the bargaining agent of the employees who may be affected by the application. Although it received timely notice of the hearing, the City did not attend the hearing held on August 6, 1987. CUPE did attend the hearing. It is clear from the decision the Board issued certifying the Labourers for the bargaining unit it sought that CUPE did not take the position at the hearing that the bargaining unit proposed by the Labourers conflicted with its bargaining rights. In its decision, the Board noted the agreement of the parties that the Labourers' bargaining unit "does not cover any of the non-construction activities (and specifically the maintenance activities) covered by the respondent's (the City's) collective agreement with Local 3, Canadian Union of Public Employees".

5. It is unnecessary to set out in great detail the reason why the City did not appear at the August 6 Board hearing nor the extent of the proceedings which the City pursued subsequent to the hearing. In essence, the City felt it was denied the right to a fair hearing by the Board. By letter of August 10, 1987 the City requested reconsideration of the Board's decision and in a decision dated October 9, 1987 that request was denied. The City commenced judicial review proceedings on November 25, 1987. The Divisional Court dismissed the application for judicial review on Octo-

ber 5, 1988. By notice of motion dated October 20, 1988, the City applied for leave to the Court of Appeal. The Court of Appeal denied leave to appeal.

6. During the course of the above proceedings, the Labourers and the City reached certain understandings. By letter dated October 8, 1987 from its counsel, the City undertook "not to let any contract or retain any services for the use of non-union labourers or carpenters until such time as the issue of certification has been resolved". In January 1988, the City undertook, on a "without prejudice" basis, to abide by the terms of the Labourers' Provincial Collective Agreement. The parties also agreed that while the certificates were being contested there would be no bargaining in the non-ICI sectors.

7. The first negotiating meeting took place on October 27, 1989. The last meeting prior to the filing of this application occurred on July 8, 1991 when the parties met with a conciliation officer. By notice dated July 15, 1991 the Minister of Labour informed the parties that he would not appoint a Conciliation Board. For our purposes, it is not necessary to review in detail what occurred during bargaining. However, two aspects of the negotiations which are central to this application are worth reviewing in some detail. The first concerns the City's position on who it intended to employ to perform work under the Labourers' collective agreement and the second concerns the subcontracting issue.

8. During the course of bargaining in the Spring of 1991, B. Suppa asked R. Bernardi, who handled the negotiations on behalf of the City, whether the City intended to hire members of the Labourers to perform work falling within the Labourers' bargaining unit. Mr. Bernardi was quite unequivocal when he responded that the City did not intend to employ directly members of the Labourers. The City explained that this was so because the work which the Labourers' members would perform was being performed and has always been performed by City employees represented by CUPE. The City expressed the view that it first had an obligation to its own employees.

9. From the outset of the negotiations, the City indicated it would not agree to a subcontracting provision of the sort that is commonly found in construction agreements. The Labourers initially proposed the following clause:

- 22.01 The Employer agrees to contract, subcontract, award, assign, or in any way transfer work covered by this Collective Agreement only to others who are in contractual relations with the Union.

The Labourers subsequently amended its subcontracting proposal to read as follows:

- 22.01 The employer agrees to contract or subcontract, award or assign or in any way transfer work covered by this Collective Agreement only to those contractors who agree to perform such work in accordance with all the terms and conditions of the Collective Agreement.
- 22.02 In the event that such contractors referred to in Article 22.01 fail to perform such work in accordance with the terms and conditions of this Collective Agreement, the employer agrees that it will be responsible for such violation and fully liable in damages as if the employer had committed the violation itself.

In response to a request from the Labourers, the City proposed the following wording for a clause concerning the contracting or subcontracting of work:

- 22.01 The parties agree that the Employer has the right to contract, subcontract, award, assign or in any way transfer work covered by this collective agreement to others, whether or not such others are in contractual relations with the Union.

10. The City's reasons for the position it took at the bargaining table on the issue of subcontracting are contained in a letter from Mr. Bernardi to Mr. Suppa dated May 24, 1991, the relevant portions of which are as follows:

I do not agree with your interpretation of the City position on the contracting out provisions of the collective agreement.

The City is interested in protecting its right to contract out work to any public bidder, regardless of whether such contractor is union or non-union, has agreements with Local 1036 or any other construction union.

The City has preserved its right to contract out its work in its collective agreements with other City employees under the jurisdiction of C.U.P.E.

The City does contract out work in the I.C.I. sector to contractors certified by Local 1036 as required by the terms of the Provincial agreements. Therefore, members of Local 1036 do benefit from City work performed by contractors.

Your proposal on the contracting out provisions would effectively force contractors in the non-I.C.I. sector to enter into a contractual relationship with Local 1036 in order to be able to bid for City work. This would be a back door approach to the certification of these contractors by Local 1036, who have the right to organize and obtain bargaining rights for such employees.

In the circumstance of work regularly and normally performed by City employees, the City will abide by its collective agreements with C.U.P.E., and its own employees will continue to be utilized for the City's ongoing requirements.

11. In its submissions at the hearing, the City reviewed the position it took at the bargaining table. Mr. Bernardi emphasized that the City's primary role was not in the construction industry and that its position had to be viewed in that context. He stated that the City is accountable to approximately 80,000 ratepayers and had the obligation to award contracts to the lowest bidder able to perform the required work. He also noted that the City felt obliged to ensure that everyone, whether union or not, had access to City work. Mr. Bernardi stated that accepting either of the restrictive subcontracting provisions proposed by the Labourers would be inconsistent with its obligations as a municipal government. Mr. Bernardi pointed out that no restrictions on subcontracting were a part of the other bargaining relationships it has with various trade unions. The City was complying with the subcontracting provision in the Labourers' Provincial Collective Agreement but this was a collective agreement the City became bound to by law and did not itself negotiate.

12. For our purposes, the relevant statutory provisions are as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;

- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

13. The Labourers argued that it is entitled to a direction since the process of collective bargaining has been unsuccessful for the reasons set out in 40a(2)(a), (b) and (c). However, the central feature of the Labourers' position is that by taking the position it has during bargaining, the City has refused to recognize the bargaining authority of Labourers. Having reviewed all of the material before us and the parties' submissions, the Board has concluded that the Labourers' position has considerable merit.

14. As a result of a certificate issued by the Board to the Labourers in 1987, the Labourers have bargaining rights for a bargaining unit of construction labourers employed by the City in the non-ICI sectors of the construction industry in Board Area #21. No other trade union holds bargaining rights for construction labourers employed by the City. CUPE did not oppose the Labourers' application in 1987 and it agreed that its bargaining rights pertained to maintenance work. The City takes the view that some of the work that would fall under the Labourers' agreement has been performed in the past by CUPE members and it feels an obligation to ensure that CUPE members continue to perform this work. It is this approach which led the City to advise the Labourers during bargaining that it did not intend to hire labourers under the Labourers' agreement. In the Board's view, this is a clear case of an employer refusing to recognize the bargaining authority of a trade union. It is the Labourers that have the bargaining rights for construction labourers and the City fails to recognize this when it says that CUPE members will be assigned work of construction labourers. It is not our view of the situation that the City has any anti-union sentiments towards the Labourers. When Mr. Bernardi indicates that the City feels an obligation to its current employees, we have no doubt that its approach is genuine. The difficulty, however, is that such an approach fails to recognize the bargaining authority of the Labourers and this is one of the reasons why the negotiation process between the Labourers and the City has not been successful.

15. The effect of the City's approach as addressed above is compounded by the City's refusal to include one of the subcontracting clauses proposed by the Labourers. By saying it will not hire persons to perform construction labourers' work under a Labourers' collective agreement and by not agreeing to a subcontracting provision, the Labourers' bargaining rights are virtually meaningless.

16. In *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, the Board made the following comments concerning subcontracting provisions:

35. In arriving at this conclusion the Board recognizes that, in the context of the construction industry, a sub-contracting clause may serve a purpose parallel to that of the union shop, or union dues provision, in the industrial setting. Both types of clauses can be construed as attempts by trade unions to enhance their strength as collective entities. At this point, however, the comparison ends. Union security in the industrial setting appears to refer primarily to provisions, such as union shop clauses and dues shop clauses, which serve to ensure that all members of the bargaining unit contribute to the financial support of the bargaining agent. In the construction industry, on the other hand, union security appears to be more related to contractual provisions recognizing the union's claim to particular work, i.e., the sub-contracting provisions. These provisions appear to be primarily directed at preserving a union's work jurisdiction so that it can continue to provide work for its members. The construction union in so doing is then able to maintain its own strength as a collective entity.

36. The object of a sub-contracting clause is to preserve the work jurisdiction of the trade union which is the beneficiary of the clause. While it may be that a sub-contracting clause, such as the one contained in the MTABA-Council agreement, has a much greater impact than the one con-

tained in the agreement between Local 1 and the MCAT, both share a common purpose - to ensure that any work contracted-out is performed only by members of the union which has obtained the sub-contracting clause. In both cases, moreover, this purpose is carried out by the placing of restraints upon the tendering of sub-contracts, restraints that prevent the members of other unions from gaining access to the work. In the light of these considerations it would not be consistent for the Board to distinguish between forms of sub-contracting arrangements. In the Board's view, all such arrangements fall outside the scope of section 38(1)(a), and must find their legal jurisdiction elsewhere in the *Labour Relations Act*. If the sub-contracting provision in the MTABA-Council agreement is illegal then so must be the sub-contracting clause in the Local 1-MCAT agreement.

17. We note the above reference to indicate the implications for the Labourers in not having a subcontracting provision in the circumstances of this case. It is unnecessary for us to decide whether the City's uncompromising position on the subcontracting position is without reasonable justification.

18. Having concluded that the negotiation process for a first collective agreement between the City and the Labourers has been unsuccessful as a result of the City's refusal to recognize the bargaining authority of the Labourers, the Board hereby directs that the first collective agreement be settled by arbitration.

2713-90-R Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Sealy Upholstery Canada Inc.** and/or Price Waterhouse Limited and/or William Stuart Nathanson c.o.b. as Brighton Furniture and/or Nopans Ventures Ltd. and/or 883727 Ontario Inc., Respondents

Adjournment - Practice and Procedure - Related Employer - Sale of a Business - Counsel failing to collect and advise Registrar of dates for hearing convenient for all parties - Counsel unable to arrange dates acceptable to everyone and requesting that the matter be scheduled by the Board without agreement of all parties - Registrar scheduling 5 dates for hearing and parties subsequently agreeing to adjourn all but one - Parties advised that as result of their conduct in scheduling of this matter, Board unlikely to have further hearing dates available prior to March 1992

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members G. O. Shamanski and E. G. Theobald.

DECISION OF THE BOARD; September 4, 1991

1. Labour relations delayed are labour relations denied (*Journal Publishing Co. of Ottawa et al. v. Ottawa Newspaper Guild, Local 205, OLRB et al.*, Mar. 31, 1977, *Ontario Court of Appeal*, unreported). Delay works unfairness and hardship in labour relations (*Re United Headware and Biltmore/Stetson (Canada) Inc.* (1983) 41 O.R. (2d) 287).

2. It is legitimate for a party affected by a labour relations proceeding to complain of untoward delays in it, but not when it has itself caused or willingly participated in those delays.

3. This is an application for relief under subsection 1(4) and section 63 of the *Labour Relations Act*. It first came on for hearing on April 5, 1991. For reasons given in the decision of the same date (subsequently amended April 12, 1991), the Board (differently constituted in part) adjourned the the proceeding and wrote that:

9. To assist in the scheduling of the application, the applicant undertook to collect and advise the Registrar of dates for hearing convenient for all parties. The Registrar should await the advice of the applicant in that respect before scheduling this matter for hearing.

4. When by mid-June, 1991 nothing had been heard from the parties, the Board (again differently constituted in part) wrote in a decision dated June 21, 1991 as follows:

2. Having received no communication from any of the parties with respect to this proceeding, the Registrar twice contacted counsel for the applicant. Counsel was to advise the Board of the status of the matter.
3. To date, the Board has heard nothing from the applicant or any of the other parties, either pursuant to the applicant's undertaking and Board decision as aforesaid, the Registrar's inquiry, or otherwise.
4. The parties are directed to forthwith advise the Board of the status in this matter. If they fail to do so satisfactorily within twenty-one (21) days of the date hereof, this application will be dismissed.

5. By letter dated June 28, 1991, the applicant, by its solicitors, wrote to the Board as follows:

We acknowledge receipt of the decision of the Board dated June 21, 1991 with respect to the above matter.

We are aware of the undertaking of the Applicant to collect and advise the Registrar of dates for hearing convenient for all the parties. We are further aware of the telephone calls from the Registrar inquiring as to the status of this matter.

For the information of the Board, since the hearing of this matter in April 5, 1991, we have repeatedly contacted counsel for the various parties involved in these proceedings in an attempt to arrive at mutually agreeable hearing dates. Unfortunately, whether due to the large number of parties involved in these proceedings and their ever shifting schedules or for other reasons, we have been unable to arrange dates acceptable to everyone. The Applicant certainly does not wish this matter to be dismissed and still wishes to pursue its application. Accordingly, in these circumstances, we request that the matter be scheduled for hearing by the Board without the agreement of all the parties since this appears to be impossible to obtain.

6. The Registrar then scheduled this matter to be heard on September 4, 5, 26, 27 and 30, 1991.

7. By letter dated August 21, 1991, counsel for the respondent William Stuart Nathanson c.o.b. as Brighton Furniture wrote to the Board with respect to the scheduled hearing dates as follows:

With respect to the dates scheduled for the hearing of the above-noted matter, each of the parties consent to adjourn the hearings scheduled for September 4, 5, 26 and 30, 1991. All parties are available on September 27, 1991 as scheduled.

The parties will attempt as amongst themselves to arrange mutually convenient dates for the hearing and advise the Board.

We trust that this is satisfactory and await confirmation of same from the Board.

8. By letter dated August 22, 1991, counsel for the applicant wrote to the Board that:

On August 9th last the Board issued a hearing notice setting this matter down for hearing on September 4th, 5th, 26th, 27th and 30th, 1991. After extensive consultation among counsel it now appears that the only mutually convenient date for all parties is September 27, 1991.

Accordingly we wish to advise you that the parties have agreed to adjourn the hearings scheduled for September 4th, 5th, 26th and 30th, 1991.

Should you have any questions with respect to any of the foregoing, please do not hesitate to contact us.

9. Having regard to the agreement of the parties, the Registrar cancelled the September 4, 5, 26 and 30th, 1991 hearing dates. Accordingly the matter will proceed on September 27, 1991 only.

10. At the September 27, 1991 hearing, the parties should be prepared to set further hearing dates, if necessary. Experience shows that where multiple hearing days are required in a case like this one, they are best held in close proximity to each other. The parties should be aware that, as a result of their conduct with respect to the scheduling of this matter, it is unlikely that the Board will have such further hearing dates available prior to March, 1992.

3005-90-R The Toronto Hospital, Applicant v. The Ontario Nurses' Association, Respondent

Bargaining Unit - Sale of a Business - Toronto General Hospital and Toronto Western Hospital merging into The Toronto Hospital in 1986 - ONA representing nurses in separate bargaining units at both locations - Hospital making application under section 63 and asking Board to declare that there should be only one full-time and only one part-time bargaining unit for both locations - Board satisfied that concerns raised by Hospital are matters to be addressed by the parties through bargaining, and not by the Board through an exercise of powers under section 63(6) of the Act - Application dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *D. G. Wozniak* and *A. HersHKovitz*.

APPEARANCES: *Wallace Kenny*, *V. Stoughton*, *S. Twyon* and *Clay Appleton* for the applicant; *Chris G. Paliare*, *Martin Doane* and *Jo-Anne Boulding* for the respondent.

DECISION OF ROBERT HERMAN, VICE-CHAIR, AND BOARD MEMBER, A. HERSHKOVITZ; September 6, 1991

1. This is an application brought by the Toronto Hospital pursuant to section 63 of the *Labour Relations Act*. The Hospital alleges that a "sale" took place within the meaning of that section, and as intermingling occurred thereafter, the Hospital asks for remedial relief pursuant to section 63(6). Specifically, it asks that the Board declare that there should be one full-time bargaining unit and one part-time bargaining unit. The respondent Ontario Nurses Association ("O.N.A.") agrees that a sale took place at the relevant time, but argues that no intermingling has

occurred, and in any event, the Board ought not to exercise its discretion to merge the existing bargaining units.

2. The parties filed four volumes of agreed facts and exhibits at the commencement of the hearing. In addition, the Board heard the evidence of W. Vickery Stoughton, called on behalf of the Hospital. O.N.A. led no *viva voce* evidence.

3. Prior to October, 1986, both Toronto General Hospital and Toronto Western Hospital existed as distinct hospitals in the City of Toronto. For a number of years O.N.A. represented separate bargaining units of full-time and part-time nurses at the Toronto Western Hospital, and a bargaining unit of full-time nurses at the Toronto General Hospital. O.N.A. and the Toronto Western Hospital have always had a good bargaining relationship, while the relationship between O.N.A. and the Toronto General Hospital has for many years been fractious and difficult. O.N.A. itself is the bargaining agent, although different locals of O.N.A. administered the collective agreements at each hospital.

4. In February 1986, the two hospitals decided to seek government approval for a merger. Vickery Stoughton, the Chief Executive Officer at the Toronto General Hospital was the chief architect of the merger. The merger was designed to accomplish several objectives. It would enable the two institutions to rationalize services, maximizing their resources with resultant costs and efficiency savings. It would also enable the two institutions to improve patient care and to enhance their function as a teaching resource.

5. With respect to the potential effect on employees at the two institutions, including nurses in the O.N.A. bargaining units, the Hospital published to all staff in both institutions, shortly prior to the merger, policy guidelines with respect to the treatment of employees. The guidelines were officially endorsed by O.N.A. Those guidelines indicated that employees transferring, as a result of the merger, from one hospital to the other would be treated as nearly as possible as if they had always been employed by the receiving hospital. In other words, the parties at the time agreed on a policy that recognized full portability of seniority. They also agreed that no employee would lose his or her employment as a direct result of the merger.

6. On October 29, 1986, the *Toronto Hospital Act*, an Act of the provincial Legislature, created the Corporation of the Toronto Hospital, the applicant herein. That statutory merger is admitted to be a "sale" within the meaning of section 63 of the Act. In effect, from the effective date of that statute, the new employer, of employees of both the Toronto Western and Toronto General Hospitals, became the Toronto Hospital. The formerly separate hospitals became the Western Division and the General Division of the Toronto Hospital. Vickery Stoughton became the Chief Executive Officer of the Hospital.

7. Although only a single hospital now, because of government reporting requirements the Hospital agreed to the government's request that it continue to report its activities for three more years as if it were still separate entities. This separate reporting was to expire in April, 1990.

8. The collective agreements that had been in effect prior to the merger continued in effect, and were honoured by the Hospital, subsequent to the merger. The Hospital applied to each Division the respective collective agreements(s) that had bound the predecessor hospitals; for example, the collective agreement between Toronto General Hospital and O.N.A. for full time nurses, was now applied by the new employer, the Hospital, to the full time nurses in its General Division. The three pre-merger collective agreements all apparently expired at the end of March, 1988.

9. In December, 1986, O.N.A. acquired representation rights for the part-time nurses at the General Division of the Toronto Hospital. O.N.A. thus represented nurses in the four nursing bargaining units at the Hospital, a full-time bargaining unit and a part-time bargaining unit at the General Division, and a full-time bargaining unit and a part-time bargaining unit at the Western Division. Again, those bargaining rights were all held by O.N.A. itself, and not a local of O.N.A.

10. As had been anticipated at the time of the merger, the Hospital began to consolidate or rationalize some of its departments. In March, 1987, the Hospital consolidated its Ophthalmology Department by transferring the Inpatient Service, Operating Room, Clinic and Physicians Offices from its General to Western Division. This consolidation involved moving some nurses from the General Division to the Western Division to accompany the transfer in the services. O.N.A. agreed to full portability of service and seniority for those employees.

11. Towards the end of April, 1989, the Board of Trustees of the Hospital voted its approval in principle of substantial further rationalizations of services between the divisions. O.N.A. had by then taken the position that it was opposed to portability of seniority and benefits. The nurses in each of the bargaining units had also voted against transfer of benefits. The Board was advised of these positions or wishes prior to deciding to approve the rationalizations.

12. In December, 1989, the Hospital transferred one ward of the Neurosurgery Department from its General to Western Division, again transferring some nurses as well. Again, the Hospital recognized those employees' full service and seniority. Even though it was on record as opposing the relocation of departments, O.N.A. agreed to the maintenance of seniority and benefits for nurses transferring with the department.

13. In February, 1990, the Hospital and O.N.A. signed collective agreements, each effective from April 1, 1988, to March 31, 1991, representing the two nurses' bargaining units at the General. In June, 1990, collective agreements were signed with respect to the Western. During bargaining for these agreements, in 1989, the Hospital had not requested that the two full-time and the two part-time bargaining units be merged into one unit each. Mr. Stoughton testified that it had not raised this issue for several reasons. The Board of Trustees had only approved in principle the further substantial rationalizations. Final approval was still pending. The Hospital was still reporting to the government as separate entities (see paragraph 7 above). The whole structure of the Hospital was still evolving, with doctors and other staff still perceiving themselves as identifying with the Western or the General rather than the Hospital. Mr. Stoughton testified that the Hospital also believed that the principles that had governed during the earlier transfers would continue to apply. It is not clear why the Hospital believed this to be true, as it knew that O.N.A. and the nurses in each bargaining unit were then opposed to the relocations and to transfer or portability of seniority and benefits.

14. The scope or recognition clauses in all four post-merger collective agreements refer only to employees at a particular Division. The language in the scope clauses in the three agreements that had existed before the merger remained unchanged. The scope clause for the full-time unit at the General Division, recognized O.N.A. for "all registered and graduate nurses employed by the Toronto General Hospital in a nursing capacity in the City of Toronto..." The scope clause for the part-time bargaining unit at the General Division, first organized after the merger, recognized O.N.A. as the bargaining agent for "all registered and graduate nurses at Toronto General Hospital, now formally known as the Toronto Hospital, Toronto General Division..." The clause goes on to say "whereas Toronto General Hospital and Toronto Western Hospital were amalgamated creating the Toronto Hospital, the parties agreed, and it is hereby understood that the collective agreement only applies to the pre-existing Toronto General Hospital." The scope clauses for the

two units at the Western recognized O.N.A. as the bargaining agent for “all registered and graduate nurses employed by the Hospital engaged in a nursing capacity...” Those agreements appear to refer to the Western Hospital as “the Hospital”.

15. In April, 1990, the Board of Trustees gave final approval to the major rationalizations and the consolidation was announced. Commencing in May, 1990, and continuing through July, 1990, numerous services or departments were transferred, together with numbers of full-time and part-time nurses, from one Division to the other. The Hospital continued to recognize full portability of seniority, service and benefits of those nurses transferred between locations. As had been true of all the prior changes in location, nurses so transferring were given the option of whether to transfer, with full portability, and a six-month right of return to their original location if they so desired. O.N.A. objected to the transfers of seniority and benefits occurring from May, 1990 on, and grieved such transfers.

16. On August 28, 1990, the Toronto Hospital filed a prior section 63 application (Board File No. 1423-90-R), seeking essentially the same relief as it seeks in the instant application. By that time, most of the relocation of hospital departments had been completed. That application was however withdrawn on the basis of a Memorandum of Settlement reached between the parties. That Memorandum of Settlement reads as follows:

MEMORANDUM OF SETTLEMENT

Concerning the Section 63 application filed by the Hospital, OLRB File No. 1423-90-R and the Section 89 applications filed by the Union, the agents of the parties agree to unanimously recommend to their respective principals the following terms and conditions of settlement:

- 1(a) The parties agree with respect to the transfer of nurses between the Western and General sites of the Hospital which have occurred prior to these applications being filed, and with respect to future transfers, that nurses transferred will be credited with their full seniority, service and benefits and will not be treated as newly hired nurses at the new location.
- 1(b) The nurses referred to in paragraph 1(a) shall have six (6) months from the date of transfer to indicate whether or not they wish to return to their previous site. The nurse(s) will inform her/his nurse manager in writing of her/his wish to return.
- 1(c) Nurses referred to in paragraph 1(a) shall not transfer nor be entitled to apply for a vacant position within the bargaining unit at the new site for six (6) months from the date of transfer to the new site, unless there are no applicants at the new site who have applied for the job.
- 1(d) The Hospital agrees with respect to future moves from site to site that they will provide the Union with as much notice as reasonable under the circumstances.

The Hospital will meet with the Union to discuss such moves including the location and the names of the nurses affected as well as the mechanics of the move including the time frame.
- 1(e) When a nurse's job is transferred to the other site, such position will not be posted pursuant to Article 10.06 of the Full-Time Collective Agreement, or Article 10.05 of the Part-Time Collective Agreement unless the nurse refuses the transfer.
2. The parties agree that as part of the negotiations for the renewal of the Collective Agreements with the Union, at the two sites, the Hospital will table

a proposal regarding the merger of the full-time agreements into one agreement, and the merger of the part-time agreements into one agreement, and the Union will agree to discuss it.

3. The Section 63 application will be withdrawn if the two principals ratify the Memorandum of Settlement. The Hospital reserves its right to file another Section 63 application based on the same facts. The Union will not rely upon the time between November 7, 1990 and the new filing date, should there be another application.
4. Both parties agree that paragraphs 1(a) to 1(e) shall be included in a Letter of Understanding and shall be incorporated into the next collective agreement(s) between the parties.
5. The Union agrees to withdraw the Section 89 complaints, OLRB File No. 1902-90-U and 1903-90-U and the grievances relating to the transfer of nurses which were filed at the General and Western sites, dated May 17, 1990, if the two principals ratify the Memorandum of Settlement.
6. Should either party's principals not ratify the terms of this memorandum, the hearing into these issues shall commence on the days set down for hearing and no reference to this memorandum or any vote with respect to it shall be made by either side at the hearing.

DATED at Toronto, Ontario, this 9th day of November 1990.

17. The Board was told that the parties were subsequently of different opinions as to the meaning of this settlement. The area of subsequent disagreement was not identified. Accordingly, in the result, the Memorandum of Settlement did not settle the dispute between the parties.

18. The instant application was filed by the Hospital on February 15, 1991. Subsequent to that date, in March, 1991, the Hospital and O.N.A. commenced bargaining. As O.N.A. was unwilling to conduct negotiations jointly, separate negotiations were held for the General and Western Divisions. Both O.N.A.'s proposals for changes to the collective agreements and the Hospital's were placed before the Board. It is apparent from those proposals that both the Hospital and O.N.A. (with some differences) were proposing full portability of seniority for nurses transferring between divisions. The parties also bargained over whether there should be only two bargaining units, merging the existing ones into single full-time and part-time units. The parties met in negotiations for the General Division on March 6, 8, and 21, 1991 and for the Western Division on March 19, 1991. The parties then agreed to adjourn negotiations until the instant application was resolved. O.N.A.'s position before the Board was that it opposed full portability of seniority and benefits. We have no evidence or explanation for this change in position from its bargaining proposals.

19. In terms of the administrative organization of the Hospital, the Hospital has essentially centralized most administrative and management services across both Divisions, including nursing management. All ten Directors of Nursing, who report to the senior Vice-President of Nursing, have duties and responsibilities which cover both locations. The senior Vice-President of Nursing is responsible for both locations. Eleven nurse managers, who directly supervise bargaining unit members, have been transferred between locations. The clinical teachers and clinical nurse specialists have responsibilities for both sites.

20. The Hospital wanted to consolidate nursing to create an environment which would produce a common nursing approach, with common management and accountability. It believed that patient care would be improved with a nursing practice that allowed nurses to move between

sites as required, in order to continue treating a patient who had moved between sites. Such patient transfers might be required since, after rationalization, many services were offered only at one location. A patient at the General Division might be transferred to the Western Division for particular treatment, but the nurse at the General might have to continue treating him/her at the Western, or at least have to continue coordinating his/her treatment by the health care team. We note however, that in testimony Mr. Stoughton indicated that he was unaware of any instance when in fact a nurse had had to switch locations for this reason. This evidence was given approximately one and a half years after implementation of this practice approach.

21. The Hospital's Personnel and Labour Relations Departments are also centralized, so that a Vice-President of Human Resources is responsible for both sites. Since the Fall of 1989, a single Director of Human Resources, who reports to the Vice-President of Human Resources, is responsible for both locations. All managers in the Human Resources Department have responsibility at both locations. The Labour Relations Manager is responsible for the administration of all contracts entered into with O.N.A., regardless of location. Payroll is integrated between the two locations, as are other administrative services.

22. There are other unions and bargaining units at the Hospital. Prior to the merger, OPSEU had a collective agreement at the Toronto General Hospital. Approximately three and a half years after the merger, in 1990, OPSEU was certified at the Western Division. Since then, the Hospital and OPSEU have negotiated one collective agreement covering lab technologists and technicians at both locations.

23. CUPE also has two bargaining units and separate collective agreements. Although the Hospital in the latest round of negotiations proposed the merger of the CUPE bargaining units, CUPE and the Hospital ultimately agreed on the maintenance of two separate bargaining units. In the Hospital's view, the intermingling of CUPE employees was relatively small in numbers, and did not in any way affect patient care.

24. Based on the above, the Hospital asks that we exercise our power under section 63(6) of the Act and declare that there be only one full-time bargaining unit and one part-time bargaining unit, rather than two of each. Section 63(6) of the Act reads as follows:

63.(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

25. We only briefly highlight the parties' submissions. O.N.A. raises several reasons for opposing the application. It asserts that no intermingling has occurred, given the fact that the scope

clauses in question do not overlap or cover the same employees. It submits therefore, that any transfers of nurses between Divisions are accretions to the receiving bargaining unit. Alternatively, if there has been intermingling, it submits that we ought not to exercise any discretion under section 63(6) because this application and the intermingling it relies upon are not related to the sale, and in any event, the bargaining unit configuration ought to be resolved through bargaining between the parties. Here, the parties turned their minds to whether there should be separate bargaining units, and they signed collective agreements reflecting this bargaining structure. They intended to maintain the separate units. If the Board should exercise its discretion, O.N.A. argues that the separate bargaining units ought to be maintained, for they are clearly appropriate, and the employees in each wish to remain separate. It submits that the seniority rights of employees in a Division will be negatively affected if the Board declares that there is only one bargaining unit for the full-time employees and one for the part-time employees. Then employees from the other Division might well out bid an employee for a vacancy in his/her Division. The employees also need on-site local representation. Further, O.N.A. does not agree with the Hospital's patient care model and wants to resist any attempt to unilaterally impose its model across the two Divisions.

26. The Hospital argues that rationalization of services was the very reason, in part, for the merger. It asserts that such rearrangements take time in the hospital sector, particularly when they are so extensive and given the size of the two Divisions. It submits that intermingling has clearly occurred, both before and after the signing of the most recent collective agreements in February, 1990. To maintain separate bargaining units will be to perpetuate the unfortunate perception that there are still two different hospitals. It argues that it makes no labour relations sense to have two separate bargaining units of nurses, each covering only the classification of "nurse", each with the same bargaining agent, and each with the same employer. It particularly makes no sense because it unduly fragments the workplace, it has led to and will lead to duplicative grievances, extra bargaining costs, and inconsistent terms and conditions for nurses employed by the same institution and working with each other. Having two bargaining units will impede the career opportunities of the nurses. It will interfere with sound patient care, for two reasons; it will obstruct the ability of nurses who wish to move with a transferring service from doing so, and it will make it difficult for the Hospital to execute its new patient care model, where a staff nurse co-ordinates a patient's health care team, even when the patient moves to the other Division's facilities, and when on occasion, as appropriate, the same nurse is to travel to the new location to continue treating the patient. The Hospital asserts that it has not filed this application before because there was no need to do so, given O.N.A.'s earlier consent to full portability of benefits, and because it waited until the most significant intermingling occurred. It submits that a consideration of the history between the parties will illustrate why bargaining will not solve this matter, particularly given the fact that the Hospital cannot take the issue of bargaining unit configuration to impasse, and that, in this sector, interest arbitrators will decide unresolved matters. The potential for inconsistent conditions in the bargaining units at the different Divisions is thus magnified, as different interest arbitrators might well reach different conclusions. Although it recognizes that seniority of nurses may be affected, it notes that seniority is not in issue here, only the appropriate bargaining unit. O.N.A. can still seek to negotiate Division seniority for vacancies within a Division, or for that matter, no portability of seniority in transfers. It notes however that O.N.A.'s bargaining proposal is for such portability. In summary, it submits that the issue here is to decide on a bargaining unit or units that make labour relations sense.

27. It is agreed, and we so find, that a sale occurred, within the meaning of section 63 of the Act, when the two prior hospitals became the Toronto Hospital through statutory merger in October 1986. We need not deal with O.N.A.'s argument that there was no intermingling, given our reasons below.

28. Assuming intermingling occurred, the question is whether we ought to exercise our discretion pursuant to section 63(6). The purpose of section 63 is to preserve existing bargaining rights (and other labour relations rights) when a "sale" within the meaning of that section occurs. When the purchased business is in some fashion intermingled with another business, problems can occur; for example, where conflicting collective agreements apply, or where an unorganized business is intermingled with an organized business. It is precisely those types of situations that section 63(6) is designed to address. But it must be kept in mind that the section is designed to deal with problems that flow from or directly relate to the sale events. The Board exercises this discretion when necessary to deal with problems that are a direct consequence of the sale and resultant intermingling. Our discretion ought not to be exercised to deal with work place problems unrelated to intermingling problems consequent upon the sale.

29. At the time of the merger, O.N.A. was on record as supporting full portability for any nurses affected by the merger, particularly with respect to transferring departments. The first transfer of departments occurred in March, 1987. Nurses were afforded the choice by the Hospital as to whether they went with the transferring department or not, and the Hospital agreed that nurses could have a six month right of return to their original location. Nurses so transferring were credited with full portability of all benefits. O.N.A. agreed to this treatment.

30. In April, 1989, the Board of Trustees gave its preliminary approval to the further extensive relocations. By that time however, O.N.A. had clearly advised the Hospital that it was no longer supportive of full portability for nurses transferring with departments, and that it opposed both the transfer of departments from one location to the other, and portability of any benefits. When the next relocation occurred, in December 1989, although O.N.A. in the result agreed to portability of benefits with respect to that particular transfer, it was still opposed to the transfer of departments and to portability of benefits.

31. During 1989, the Hospital was engaged in negotiations with respect to both the General and Western Divisions. It did not raise during those negotiations any request that the bargaining units at the different locations be merged into a single bargaining unit. The new agreements with respect to the full-time and part-time bargaining unit at the General Division were signed in February, 1990. Although the language in the scope clause for the full-time bargaining unit was unchanged from the prior (pre-merger) collective agreement, when the Toronto Hospital signed these agreements it, and O.N.A., were recognizing separate bargaining units at each location. As the single employer, the Hospital agreed to collective agreements that only covered one of its two Divisions. The agreements were signed at a time when the Hospital knew of significant further relocations that were planned for the near future, and with the knowledge that O.N.A. was opposed to such relocations and to any portability for nurses. The Hospital did not bring an application pursuant to section 63(6) of the Act at that point.

32. Once the Hospital agreed to maintain bargaining units at each location, any problems caused by overlapping or conflicting collective agreements, or other potential intermingling problems, disappeared. Because the scope clauses in the new collective agreements referred only to those employees at the location in question, there was no overlap or conflict between the two collective agreements. Although the collective agreements with respect to the Western were not signed until June, 1990, signing the agreements for the General in February, 1990 effectively maintained the separate bargaining units. As of February, 1990, therefore, both bargaining parties had agreed that there should be separate non-overlapping parts, or bargaining units, in the new merged business of the Toronto Hospital. From that point on, the parties themselves had resolved how to deal with any problems resulting from the bargaining unit configuration and potentially overlapping collective agreements. They had negotiated an arrangement whereby the pre-existing separate

bargaining units would continue to exist in the new business, without any conflicts in the collective agreements.

33. Shortly thereafter, the further major rationalizations occurred, predominantly during May, June, and July, 1990. The Hospital then filed the prior section 63 application, asking the Board to merge the separate bargaining units it had agreed to several months earlier. As noted above, that application was withdrawn on the basis of a Memorandum of Settlement entered into on November 9, 1990, with the instant application being filed on February 15, 1991, after the parties found themselves in disagreement over the meaning of that document.

34. In support of its request that the Board exercise its discretion under section 63(6), the Hospital argues that there are and will be serious problems if the bargaining units are not consolidated by the Board. It submits that patient care will suffer if the separate bargaining units continue. First, it argues that the new patient care model, with a nurse co-ordinating the efforts of the health care team, and with a nurse travelling to the other location to treat a patient where necessary, demands one bargaining unit. But this patient care model has been in place for approximately one and a half years, with separate bargaining units, and there is no evidence that a single problem has resulted. We can only conclude that separate bargaining units present no problem in this area. Second, it argues that patient care is maximized if nurses accompany departments that are transferring locations. We note that most of the transferring departments have already been fully relocated, with all the restaffing accomplished, and this was done in a structure that had separate bargaining units. Additionally, the Hospital has always allowed nurses a six month right of return to the originating location. Such right of return would seem inconsistent with a claim that it is necessary to have nurses accompanying the transferring department. We note as well that there is no question that the Hospital will be able to staff transferring departments with fully qualified nurses. The evidence in short indicates that patient care is not related to the bargaining unit configuration.

35. The Hospital submits that two bargaining units inappropriately maintain the perception of nurses as working in two different hospitals. Although this may well be the nurses' perception (we have no such evidence), there is no real evidence as to why this would cause a problem for the Hospital. The fact is that such a perception has not impeded the transfers and that the transfers have largely been accomplished.

36. The Hospital argues as well that two separate bargaining units will impede the career opportunities for nurses. The Hospital is entitled to and able to obtain fully qualified nurses for any nursing position. It is difficult therefore, to see how the Hospital's assessment of the best career opportunities for nurses should outweigh the assessment of O.N.A. and the nurses themselves, that separate bargaining units are preferable. In any event, this potential problem does not justify merging two bargaining units into one bargaining unit. In the context of the separate bargaining units they maintained, the parties are fully able to negotiate seniority and portability of benefits issues, together with specific posting provisions which will ensure expanded career opportunities for nurses in either bargaining unit.

37. Finally, there are a number of matters raised by the Hospital which do appear to be borne out by the evidence. The maintenance of separate bargaining units could well lead to duplicative grievances in the future, and could also lead to some extra bargaining costs as the Hospital will have to bargain with respect to four bargaining units, rather than two. And because negotiating impasses are resolved by interest arbitration in this sector, there is a potential for different results and different terms and conditions for employees in the bargaining units, resulting from different awards of interest arbitrators. There is no single resolution mechanism that will necessarily address these problems. Although the parties could agree to place any interest arbitrations for the

separate bargaining units before a single interest arbitration board, that depends on their ability to agree to do so. Thus, we recognize that maintaining all of the existing O.N.A. bargaining units may lead to future problems and that merged bargaining units might better serve both parties.

38. Even so, we cannot lose sight of the fact that these potential problems all existed at the time that the parties agreed to the current collective agreements, which maintained a separate location and Division bargaining unit structure. As noted above, the Hospital did not raise the matter in bargaining, and signed new collective agreements with separate bargaining units. Thus, the parties thereby effectively dealt with the problems themselves, in large part eliminating any intermingling problems caused by the sale.

39. It is not dispositive that the Hospital brought this application approximately five years after the merger occurred. Given the nature of the merged institutions, and the time necessary in order to properly plan and implement the rationalizations in question, the passage of time is only one factor. Of more importance are the events that have occurred in that five year period, particularly the signing of the new collective agreements, at a time when the Hospital knew of its rationalization plans and of O.N.A.'s objection to them, and at a time when the problems it now seeks to rely on to justify our intervention were all present. We do not find it appropriate to exercise our discretion under section 63(6) to amend those bargaining units when the two parties have chosen to maintain the current structure, when any potential problem of overlapping or conflicting collective agreements caused by the sale and intermingling has thus been eliminated, and any other potential labour relations problems were evident before the current agreements were signed.

40. For these reasons, the Board issued its decision (with Board Member Wozniak dissenting), dismissing the application, with reasons to follow. The effect of our decision is that the parties will now resume their negotiations, in which they can address concerns such as portability of seniority and benefits, posting rights, and whether it is more sensible, from a labour relations perspective, to have merged bargaining units or to agree to joint bargaining. In this respect, we note that both parties seek full portability of seniority in their bargaining proposals (cf. paragraph 18 above). In the circumstances of the instant case, we are satisfied that those are matters to be addressed by the parties through bargaining, and not by the Board through an exercise of powers under section 63(6) of the Act.

DECISION OF BOARD MEMBER, D. WOZNIAK; September 6, 1991

I dissent.

COURT PROCEEDINGS

1062-91-R (Court File No. A-65/91) Chapleau Forest Products Limited, Appellant v. Ontario Labour Relations Board, IWA-Canada, and IWA-Canada, Local 1-2995, Respondents

Certification - Evidence - Judicial Review - Membership Evidence - Membership cards headed by name of local union bringing certification application, but body of cards referring only to national union - Board ruling cards valid membership evidence for local union - Employer seeking judicial review - Court observing that Board made purely factual determination and that interpretation of a union membership form lay at the heart of Board's specialized jurisdiction - Judicial review application dismissed by Divisional Court - Court of Appeal dismissing application for leave to appeal

Board decision reported at [1990] OLRB Rep. Dec. 1243; Divisional Court decision reported at [1991] OLRB Rep. April 577.

Court of Appeal, Houlden, Griffith and Carthy JJ.A., September 23, 1991.

Houlden J.A. (endorsement): The motion for leave to appeal is dismissed with costs.

CASE LISTINGS AUGUST 1991

PAGE

1.	Applications for Certification	193
2.	Applications for First Contract Arbitration	206
3.	Applications for Declaration of Related Employer.....	206
4.	Sale of a Business	207
5.	Union Successor Rights	207
6.	Applications for Declaration Terminating Bargaining Rights.....	207
7.	Applications for Declaration of Unlawful Strike (Construction Industry)	208
8.	Complaints of Unfair Labour Practice	208
9.	Applications for Consent to Early Termination of Collective Agreement	212
10.	Jurisdictional Disputes.....	212
11.	Applications for Determination of Employee Status.....	212
12.	Complaints under the Occupational Health and Safety Act	212
13.	Construction Industry Grievances	213
14.	Applications for Reconsideration of Board's Decision	216

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1868-89-R: Amalgamated Transit Union, Local 616 (Applicant) v. Transit Windsor (Respondent) v. Group of Employees (Objectors)

Unit: "all employees, including the payroll supervisor, of the respondent in Windsor, save and except supervisors, including operations supervisors, persons above the rank of supervisor, secretary to the general manager, secretary to the operations manager, the human resources clerk, accountant, the transportation scheduler, the purchasing agent, the transportation planner, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of October 31, 1989" (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3095-90-R: Sudbury Mine, Mill & Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill & Smelter Workers (Applicant) v. 390450 Ontario Inc. c.o.b. as Midas Muffler Long Lake, and 772312 Ontario Inc. c.o.b. as Midas Muffler Barrydowne (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of the Employer at 2055 Long Lake Road and 485 Barrydowne Road in the City of Sudbury, save and except foremen, persons above the rank of foreman, the bookkeeper, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

0377-91-R: Ontario Nurses' Association (Applicant) v. Parry Sound District General Hospital (Respondent)

Unit: "all registered and graduate nurses employed by the respondent in the Districts of Parry Sound and Muskoka in its home care program, save and except nurse supervisors, persons above the rank of nurse supervisor and nurses covered by subsisting collective agreements" (37 employees in unit) (*Having regard to the agreement of the parties*)

0495-91-R: The Independent Employees Association (Applicant) v. Lodder Brothers Ltd. (Respondent)

Unit: "all labourers and operating engineers in the employ of the respondent in all sectors of the construction industry, excluding the ICI sector in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin; the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman" (27 employees in unit) (*Having regard to the agreement of the parties*)

0716-91-R: United Steelworkers of America (Applicant) v. Lakeview Nursing Home Ltd. (Respondent)

Unit #1: "all employees of the respondent in the Village of Cobden, save and except supervisors, persons above the rank of supervisors, office and clerical staff, activities director, registered graduate and undergraduate nurses, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit)

Unit #2: "all employees of the respondent in the Village of Cobden regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, per-

sons above the rank of supervisors, office and clerical staff, activities director, registered graduate and undergraduate nurses” (24 employees in unit)

0746-91-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. Carecor Security Service Inc. (Respondent)

Unit: “all security guards employed by the respondent at the Toronto East General Hospital, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (17 employees in unit) (*Having regard to the agreement of the parties*)

0748-91-R: Canadian Union of Public Employees (Applicant) v. Kanata Public Library Board (Respondent)

Unit #1: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except Branch Managers, persons above the rank of Branch Manager, the Chief Librarian, Administrative Assistant, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

0950-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Springview Masonry Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0951-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. B & B Masonry Co. Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0953-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. M.C.B. Masonry Contracting Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (14 employees in unit)

0955-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. 922966 Ontario Ltd. T/A Upper Canada Masonry (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

0956-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sundial Bricklayers Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0959-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Urowall Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0962-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. El Vee Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0963-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Fernando Martins Bricklayers Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0964-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Aldo Marocco Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

0965-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Perfer Bricklayer Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0966-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. S. G. Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0970-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Ridge Landfill Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent working at the landfill site in the Township of Harwich, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of June 18, 1991" (10 employees in unit) (*Having regard to the agreement of the parties*)

1008-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Forsan Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1014-91-R: Christian Labour Association of Canada (Applicant) v. Heritage Refrigeration Ltd. (Respondent)

Unit: "all refrigeration and air conditioning mechanics, refrigeration and air conditioning Mechanics' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham" (7 employees in unit)

1026-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. Oeste Bricklayers Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1027-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. A & V Masonry Co. Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1038-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Jota Ray Masonry Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1039-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Manlu Masonry Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1054-91-R: United Brotherhood of Carpenters & Joiners of America, Drywall, Acoustics Lathing & Insulation, Local 675 (Applicant) v. Yorkdale Drywall Co. Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1096-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Carmar Masonry Co. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1097-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Afonso Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

1098-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Frank's Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1099-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Jorpao Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1100-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Four Season's Brick-laying Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1107-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Blue Sky Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1109-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cousin's Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1110-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. AJA Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1111-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Moita Masonry Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

1126-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Trafico Masonry Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

1137-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Homestead Land Holdings (Construction Division) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of the respondent in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1157-91-R: IWA - Canada (Applicant) v. Lajambe Forest Products Ltd. (Respondent)

Unit: “all employees of the respondent at its sawmill division in the Town of Thessalon, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

1233-91-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the County of Grey (Respondent)

Unit: “all employees of the respondent employed at its social and family services division in the County of Grey, save and except supervisors, persons above the rank of supervisor, secretary to the administrator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (49 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1248-91-R: International Brotherhood of Painters & Allied Trades, Local 1904 (Applicant) v. Ripel Painting Inc. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all sectors of the construction within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

1279-91-R: Ontario Public Service Employees Union (Applicant) v. Onesimus Community Resource Centre (Respondent)

Unit: “all employees of the respondent in the Township of Sidney, save and except supervisors, persons above the rank of supervisor and the secretary/bookkeeper” (11 employees in unit) (*Having regard to the agreement of the parties*)

1300-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. S. Webber Electric Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

1326-91-R: Christian Labour Association of Canada (Applicant) v. Jen-Ry Excavating Co. Ltd. (Respondent)

Unit: “all construction labourers and equipment operators in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1327-91-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Vincent Spirito & Sons Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1340-91-R: The Amalgamated Transit Union, Local 1189 (Applicant) v. Guelph Mobility Service Inc. (Respondent)

Unit: “all employees of the respondent in the City of Guelph, save and except supervisors and persons above the rank of supervisor” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1385-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Repla Ltd. (Respondent)

Unit: “all employees of the respondent in the Town of Oakville, save and except forepersons, persons above the rank of foreperson, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (56 employees in unit) (*Having regard to the agreement of the parties*)

1416-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Maccaferri Gibbons of Canada Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*)

1438-91-R: United Steelworkers of America (Applicant) v. Colour Tech Fencers Inc. (Respondent)

Unit: “all employees of the respondent in the City of Scarborough, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (125 employees in unit) (*Having regard to the agreement of the parties*)

1461-91-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 141 (Applicant) v. Laidlaw Environmental Services Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of London, save and except dispatchers, persons above the rank of dispatcher, office and sales staff, and laboratory technicians” (15 employees in unit) (*Having regard to the agreement of the parties*)

1469-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Edward Masonry (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

1470-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Basil Construction (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1471-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Arcos Masonry Company Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

1473-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Cousins & Brothers Masonry Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

1478-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Proteus Electric Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1484-91-R: Office & Professional Employees International Union (Applicant) v. Levesque Plywood Ltd. (Respondent)

Unit: “all employees of the respondent in the Town of Hearst, save and except department heads, persons above the rank of department head, confidential secretary, computer programmer, personal coordinator, woodlands coordinator, persons for whom any trade union held bargaining rights as of July 24, 1991 and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

1494-91-R: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicant) v. Fanad Enterprises Ltd. (Respondent)

Unit: “all bricklayers and bricklayers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, and bricklayers’ apprentices in the employ of the respondent in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1507-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Marta Construction (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices and construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

1516-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: “all employees of the respondent employed at 200 Wellington Street West, Toronto, save and except working forepersons, persons above the rank of working foreperson, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*)

1524-91-R: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 8, Ontario (Applicant) v. Haelzle Masonry Ltd. (Respondent)

Unit: “all journeymen and apprentices bricklayers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1559-91-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Applicant) v. Belfor & Co. Ltd. (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

1573-91-R: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Axel Ulrich Contracting Ltd. c.o.b. Commercial Glass & Aluminum (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Niagara, save and except foremen, persons above the rank of foreman, office and sales staff” (21 employees in unit) (*Having regard to the agreement of the parties*)

1621-91-R: Teamsters, Local Union No. 419 (Applicant) v. Neate Roller Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (37 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0541-91-R: Canadian Union of Public Employees (Applicant) v. Foyer Richelieu (Respondent)

Unit: “tous les employés de l’intimé à Welland, à l’exception des superviseurs et des personnes dont le classement est supérieur à celui de superviseur, des employés qui exécutent un travail de bureau et un travail clérical et des infirmiers et infirmières autorisé(e)s” (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	26
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	12

1160-91-R: Niagara Health Care & Service Workers Union, Local 302 (Applicant) v. Versa-Care Ltd., St. Catharines (Formerly Bestview Health Care Centres, Inc.) (Respondent) v. Canadian Union of Public Employees, Local 1263 (Intervener)

Unit: “all dietary employees of Versa-Care Limited at its nursing home in St. Catharines, save and except managers, persons above the rank of manager, and office staff” (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	23
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	11
Number of ballots marked in favour of intervener	7

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0712-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Hotels Ltd. c.o.b. as CN MacMillan Yard Railodge & Cafeteria (Respondent)

Unit #1: “all employees of the respondent in the City of Vaughan, save and except managers, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	11
Number of persons who cast ballots	11
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0

Unit #2: “all employees of the respondent in the City of Vaughan regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except managers, persons above the rank of manager” (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	9
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1

0748-91-R: Canadian Union of Public Employees (Applicant) v. Kanata Public Library Board (Respondent)

Unit #1: (See *Bargaining Agents Certified Without Vote*)

Unit #2: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Branch Managers, persons above the rank of Branch Manager, the Chief Librarian and Administrative Assistant” (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	27
Number of names of persons on revised voters' list	25
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

0978-91-R: Ontario Nurses' Association (Applicant) v. Shelburne Residence (Respondent) v. Service Employees' International Union, Local 204 (affiliated with the A.F. of L., C.I.O., C.L.C.) (Intervener) (6 employees in unit)

1319-91-R; 1320-91-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Locals 463 & 599 (Applicant) v. Waylok Air Conditioning Ltd. (Respondent) (9 employees in unit)

1331-91-R: Service Employees' International Union, Local 204, affiliated with the S.E.I.U., A.F. OF L., C.I.O., C.L.C. (Applicant) v. The Brantford General Hospital (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener) (4 employees in unit)

1563-91-R: Canadian Union of Public Employees (Applicant) v. The Credit Valley Hospital (Respondent) (220 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1218-91-R: United Food & Commercial Workers International Union, AFL:CIO:CLC: (Applicant) v. 876661 Ontario Ltd. c.o.b. as Loeb I.G.A. Sarnia (Respondent)

Unit: “all employees of the respondent in the Municipality of Sarnia, save and except Department Managers, persons above the rank of Department Manager, office and clerical staff” (190 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	189
Number of persons who cast ballots	117
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	75

0675-91-R: Canadian Union of Public Employees (Applicant) v. Geri-Care Nursing Home of Caressant Care Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: “all employees of Geri-Care Nursing Home of Caressant Care Limited in its Nursing Home at Harri-ston, regularly employed for not more than 24 hours per week and students employed during the school vaca-tion period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff” (67 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared	70
Persons struck off list on consent of parties	2
Number of names of persons on revised voters' list	68
Number of persons who cast ballots	56
Number of ballots marked in favour of applicant	18
Number of ballots marked against intervener	38

0676-91-R: Canadian Union of Public Employees (Applicant) v. Geri-Care Nursing Home of Caressant Care Ltd. (Rest Home) (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: “all employees of Geri-Care Nursing Home of Caressant Care Limited in its Rest Home at Harriston, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff” (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	4
Number of ballots marked against intervener	5

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1216-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. G.P.M. Property Management Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 2575 Danforth Avenue, 255, 265, and 275 Main Street in the Municipality of Metropolitan Toronto, including resident superintendents, save and except assistant property manager, persons above the rank of assistant property manager, office and clerical staff and students employed during the school vacation period” (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	13

Applications for Certification Withdrawn

1971-81-R: Mauri Ahokas et al (Applicant) v. Canadian Union of Public Employees, Local 87, Canadian Union of Public Employees, Grace Hartman, G. LeBel, Eileen Okerlund, William McFarlane, Gloria Welch, Arlene Parker and Eileen Rice (Respondents)

0498-91-R: Labourers' International Union of North America, Local 607 (Applicant) v. Arcam Engineering Ltd. (Respondent)

0533-91-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Headon Contracting (1986) Ltd. (Respondent)

0880-91-R: Custom Concrete (northern) Employees Association (C.C.N.E.A.) (Applicant) v. Custom Concrete (northern) (Respondent)

1025-91-R: International Brotherhood of Painters & Allied Trades (Applicant) v. A.R.G. Construction Corporation (Respondent)

1061-91-R: Canadian Union of Public Employees, Local 794 (Applicant) v. Hamilton Civic Hospitals (Respondent)

1135-91-R: Canadian Union of Public Employees (Applicant) v. The Belleville General Hospital (Respondent)

1215-91-R: Bakery, Confectionery & Tobacco Workers International Union, Local 264 AFL-CIO-CLC (Applicant) v. Mediterranean Bakery (Respondent)

1286-91-R: United Steelworkers of America (Applicant) v. The Corporation of the Township of Red Lake (Respondent)

1313-91-R: Canadian Union of Public Employees (Applicant) v. Cedarbrook Lodge (Respondent)

1363-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. McEndon Ltd. (Respondent)

1368-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cleanol Services (Respondent)

1372-91-R: Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Applicant) v. Confectionately Yours Inc. (Respondent)

1501-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent)

1533-91-R: Canadian Union of Public Employees (Applicant) v. Hamilton Civic Hospitals (Respondent)

1574-91-R: Christian Labour Association of Canada (Applicant) v. Rosebank Villa Retirement Home (Respondent) v. Service Employees' International Union, Local 204 affiliated with S.E.I.U., A.F.L., C.I.O., C.L.C. (Intervener)

1738-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Palcor Construction Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

0606-91-FC: United Food & Commercial Workers International Union, Local 175 (Complainant) v. David Chapman's Ice Cream Ltd. (Respondent) (*Dismissed*)

1172-91-FC: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Wendy's Restaurants of Canada Inc. Store #365 (Respondent) (*Granted*)

1632-91-FC: Saxon Athletic Manufacturing Inc. (Applicant) v. IWA - Canada (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1816-90-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Povia Carpentry Trim o/a 563808 Ontario Inc. and Lomear Finishing Carpenters Co. Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

2050-90-R; 2051-90-R: Teamsters, Local 419 (Applicant) v. 176218 Canada Inc. c.o.b. as Booth Fisheries; Van Horne Fish Distributors Ontario Ltd.; and 167100 Canada Inc. c.o.b. as Groupe La Mer (Respondents) (*Granted*)

0029-91-R: Sudbury Mine, Mill & Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill & Smelter Workers (Applicant) v. 390450 Ontario Inc. c.o.b. as Midas Muffler Long Lake, and 772312 Ontario Inc. c.o.b. as Midas Muffler Barrydowne (Respondents) (*Granted*)

0139-91-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Medi Group Inc., Medi Group Masonry Ltd., c.o.b. as 'Medi Group Ltd.' and 'B & M Masonry' (Respondents) (*Withdrawn*)

0726-91-R: Sheet Metal Workers' International Association, Local 285 (Applicant) v. Toronto Air Conditioning (1981) Ltd. and Montwest Air Ltd. (Respondents) (*Withdrawn*)

1242-91-R: Labourers' International Union of North America, Local 506 (Applicant) v. Baseform Construction Ltd. and Formanti Structures Ltd. (Respondents) (*Granted*)

1418-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Supreme Carpentry Inc., Joe Panaro c.o.b. under the style of 'J & F', Joe Panaro c.o.b. under the name of Ladima Lumber (1990) (Respondents) (*Withdrawn*)

1584-91-R: United Steelworkers of America (Applicant) v. Magna International Inc. c.o.b. as Tycos Tool & Die and Conix Canada Inc. c.o.b. as Tycos Tool & Die (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0144-90-R; 0145-90-R: Teamsters, Local 419 (Applicant) v. 176218 Canada Inc. c.o.b. as Booth Fisheries; and Van Horne Fish Distributors Ontario Ltd. (Respondents) (*Granted*)

0139-91-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Medi Group Inc., Medi Group Masonry Ltd., c.o.b. as 'Medi Group Ltd.' and 'B & M Masonry' (Respondents) (*Withdrawn*)

0140-91-R: The Municipality of Metropolitan Toronto (Applicant) v. Ontario Nurses' Association and Service Employees' International Union, Local 204 (Respondent) v. Canadian Union of Public Employees, Local 79 (Intervener) (*Granted*)

0228-91-R: Canadian Union of Public Employees, Local 29 (Applicant) v. St. Mary's of the Lake Hospital (Respondent) v. Employees' Association, St. Mary's of the Lake Hospital (Intervener) (*Granted*)

0725-91-R: Sheet Metal Workers' International Association, Local 285 (Applicant) v. Toronto Air Conditioning (1981) Ltd. and Montwest Air Ltd. (Respondents) (*Withdrawn*)

1242-91-R: Labourers' International Union of North America, Local 506 (Applicant) v. Baseform Construction Ltd. and formanti Structures Ltd. (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS

1298-91-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Local 173 (Applicant) v. Famous Players Ltd. and Cineplex-Odeon Corporation and National Film Theatre (Princess Court Cinema) (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0456-91-R: Ronald Gary Emmons (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:-CLC: (Respondent) v. Hully Gully (London) Ltd. (Intervener) (14 employees in unit) (*Dismissed*)

0611-91-R: Glenn Waters et al (other member of bargaining Unit, Debbie Ayers) (Applicant) v. The Toronto Typographical Union No. 91 Communications Workers of America/Printing, Publishing & Media Workers Sector (Respondent) v. Gordon Brockie (Intervener) (9 employees in unit) (*Dismissed*)

0673-91-R: Paul Vasey (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 785 (Respondent) v. The Stairworks Ltd. (Intervener)

Unit: "all employees of The Stairworks Ltd. working in and out of Guelph, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Granted*)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

0717-91-R: Gordon J. Henderson (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Edward W. Powell (Intervener) (*Withdrawn*)

0883-91-R: Kim Dargie (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (20 employees in unit) (*Dismissed*)

1371-91-R: Gordon Trailer Sales & Rentals Ltd. (1989) (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (8 employees in unit) (*Granted*)

1383-91-R: Robin Malenfant (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Kehl Tools Ltd. (Intervener) (*Withdrawn*)

1624-91-R: The Riverside Hospital of Ottawa (Applicant) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Respondent) (*Withdrawn*)

1651-91-R: Beverley Connell (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

1834-91-R: Shirley Jean Robinson (Applicant) v. Ontario Public Civil Service Union & Management Board of Cabinet & Ontario Government (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0799-90-U: Labourers' International Union of North America, Local 183 (Applicant) v. International Union of Operating Engineers, Local 793 and Mike Gallagher (Respondents) (*Withdrawn*)

0537-91-U: The Electrical Power Systems Construction Association (EPSCA), and Ontario Hydro (Complainants) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 and Jim Phair, Fred Marr, Robert Farnsworth, Pat Packer, and Robert Chambers (Respondents) (*Withdrawn*)

1024-91-U: Millwright District Council of Ontario on its own behalf and on behalf of its Local 1151 (Applicant) v. Daycon Mechanical Systems Ltd., Sheet Metal Workers' International Association, Local 397, James Reid and Barrie Pauluk (Respondents) (*Withdrawn*)

1465-91-U: Ellis-Don Construction Ltd. (Respondent) v. Labourers' International Union of North America, Local 1059 and Jim McKinnon (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1800-81-U: Mauri Ahokas et al (Applicant) v. The Canadian Union of Public Employees, Local 87, Canadian Union of Public Employees, Grace Hartman, G. LeBel, Eileen Okerlund, William McFarlane, Gloria Welch, Arlene Parker and Eileen Rice (Respondents) (*Withdrawn*)

0800-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. International Union of Operating Engineers, Local 793 and Mike Gallagher (Respondents) (*Withdrawn*)

1081-90-U: International Union of Operating Engineers, Local 793 (Complainant) v. Labourers' International Union of North America, Local 183; Tony Lucas; and John Cardeiro (Respondents) (*Withdrawn*)

1622-90-U; 1701-90-U: Canadian Union of Public Employees, Local 3460 (Complainant) v. Southern Ontario Library Service (Respondent) (*Withdrawn*)

1850-90-U: United Steelworkers of America (Complainant) v. Guillevin International Inc. (Respondent) (*Withdrawn*)

2184-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Seligman & Latz of Polo Park Ltd., Seligman & Latz of Ottawa Ltd., Regis Corporation (Respondents) (*Withdrawn*)

2212-90-U: Amalgamated Transit Union, Local 1572 (Complainant) v. McDonnell-Ronald Limousine Service Ltd. o/a Airline Limousine Services Ltd. and Nick Lemonis (Respondents) (*Withdrawn*)

2648-90-U; 2785-90-U; 2873-90-U; 3364-90-U; 0442-91-U; 0720-91-U; 0721-91-U; 0722-91-U; 0723-91-U; 0364-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. David Chapman's Ice Cream Ltd. (Respondent) (*Dismissed*)

2837-90-U: International Union United Plant Guard Workers of America, Local 1962 (Complaint) v. University of Toronto (Respondent) (*Withdrawn*)

2965-90-U: Ontario Secondary School Teachers' Federation (Complainant) v. The Ontario Public School Teachers' Federation (Respondent) (*Withdrawn*)

3067-90-U: Canadian Union of Public Employees, Local 3419 (Complainant) v. Harrowood Seniors' Community (Respondent) (*Withdrawn*)

3406-90-U: Sudbury Mine, Mill & Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill & Smelter Workers (Complainant) v. 390450 Ontario Inc. c.o.b. as Midas Muffler Long Lake, and 772312 Ontario Inc. c.o.b. as Midas Muffler Barrydowne (Respondents) (*Dismissed*)

3427-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. David Chapman's Ice Cream Ltd. (Respondent) (*Dismissed*)

0021-91-U: Frank O'Meara, John O'Meara, Gordon Jones, Luigi Pizzigrilli, Erminio Piccolotto, Alexander Barna, Sam Bizzarro, Peter Brucculeri, Sergio Piccolotto, Bill McKinlay, William Barnes, Rudy Bonitatibus, Dominic Taiello, A. Gallagher (Complainants) v. The Hamilton-Wentworth Roman Catholic Caretakers & Maintenance Employees' Association, (Respondent) (*Withdrawn*)

0048-91-U: Labourers' International Union of North America, Local 1081 (Complainant) v. Fly-Form Inc. (Respondent) (*Withdrawn*)

0157-91-U: John Craven (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Respondents) (*Dismissed*)

0188-91-U: Erik Hansink (Complainant) v. General Motors of Canada Oshawa Truck Plant Management (Respondent) (*Withdrawn*)

0189-91-U: Erik Hansink (Complainant) v. Canadian Auto Workers Union, Local 222, Oshawa, Ont. (Respondent) (*Withdrawn*)

0277-91-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 1000 Complainant v. Sears Canada Inc. (Respondent) (*Withdrawn*)

0368-91-U: Dominik Culjak (Complainant) v. Mount Sinai Hospital (Respondent) (*Dismissed*)

0387-91-U: Ontario Nurses' Association (Complainant) v. The Municipality of Metropolitan Toronto, (Respondent) v. Canadian Union of Public Employees, Local 79 (Intervener) (*Granted*)

0407-91-U: David A. Spackman (Complainant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), and National Automobile Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 222 (Respondents) (*Granted*)

0669-91-U: Canadian Paperworkers Union and its Local 333 C.L.C. (Complainant) v. FICG Inc. (Respondent) v. Trudy Leyds (Intervener) (*Withdrawn*)

0718-91-U: Errol A. Broderick (Complainant) v. Local 787 - Refrigeration Workers of Ontario (Respondent) (*Withdrawn*)

0727-91-U: Communications & Electrical Workers of Canada (Complainant) v. Canadian Automobile Association (Respondent) (*Withdrawn*)

0735-91-U: Gerald Corby (Complainant) v. Maple Leaf Products (Respondent) v. United Food & Commercial Workers International Union, Local 530P (Intervener) (*Withdrawn*)

0831-91-U: Stella Dranka & Teriq Nawaz (Complainants) v. Amalgamated Clothing & Textile Union (Respondent) (*Withdrawn*)

0854-91-U: Alan Rasi (Complainant) v. United Association of Journeymen & Apprentices of Plumbing & Pipe Fitting Industry of the United States & Canada, Local 46, Toronto (Respondent) (*Withdrawn*)

0855-91-U: Petri Ottavainen (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, Local 46, Toronto (Respondent) (*Withdrawn*)

0864-91-U: Trudy Ledys (Complainant) v. Canadian Paperworkers Union and its Local 333, C.L.C. and Ken Cole (Respondents) v. FICG Inc. (Intervener) (*Withdrawn*)

0876-91-U: Ryan O'Neil (Complainant) v. United Food & Commercial Workers International Union, Tom Gates, Union Steward, Tom Gates Produce Manager and Zehrs Market Inc. A Division of Zehrmart Ltd. and Michael Westman, Store Mgr., (Respondents) (*Withdrawn*)

0993-91-U: International Union of Operating Engineers, Local 793 (Complainant) v. Cooper's Crane Rental Ltd.; Comstock International Ltd. (Respondents) (*Withdrawn*)

1001-91-U: Ron Whitehead (Complainant) v. United Steel Workers of America (Respondent) (*Withdrawn*)

1139-91-U: Service Employees' International Union, Local 210, A.F. of L. - C.I.O. - C.L.C. (Complainant) v. Chateau Park Nursing Home (Respondent) (*Withdrawn*)

1169-91-U: Douglas Wm. Aitchison (Complainant) v. Bakery, Confectionery and Tobacco Workers Union, Local 323T (Respondent) v. Imperial Tobacco Division of Imasco Ltd. (Intervener) (*Withdrawn*)

1171-91-U: Rolande Tessier (Complainant) v. Canadian Union of Public Employees, Local 1101 (Respondent) (*Withdrawn*)

1176-91-U: Kevin Flynn, Dan McLean (Complainants) v. Uniflo Sewer Services Inc., Bruce Allan Noble (Respondent) (*Granted*)

1192-91-U: The Association of Allied Health Professionals: Ontario (Complainant) v. Toronto East General & Orthopaedic Hospital (Respondent) (*Withdrawn*)

1219-91-U: Canadian Brotherhood of Railway, Transport & General Workers (Complainant) v. Motor Coach Industries Ltd. (Respondent) (*Withdrawn*)

1222-91-U: John Barnes (Complainant) v. Labourers' International Local 527; B. Carrozzi (Respondents) (*Withdrawn*)

1234-91-U: Canadian Union of Public Employees and its Local 2210 (Complainant) v. The Regional Municipality of Haldimand-Norfolk (Respondent) (*Withdrawn*)

1253-91-U: Communications & Electrical Workers of Canada (Complainant) v. Canadian Automobile Association (Respondent) (*Withdrawn*)

1260-91-U: Tom Kwok Chan, James Semchyschyn, Carlton Somers (Complainants) v. Hotel Employees, Restaurant Employees Union, Local 75 (Respondent) (*Withdrawn*)

1261-91-U: Donald J. Dinelle (Union Labourer 837) (Complainant) v. Nickolo (Nick) Scibetta (Labour Union 837 Business Agent), Lina Scibetta, Secretary Union 837 (Respondent) (*Withdrawn*)

1282-91-U: G.A. Paul Culham (Complainant) v. Laidlaw Transit & C.B.R.T. (Respondent) (*Withdrawn*)

1290-91-U: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Complainant) v. 623230 Ontario Inc., c.o.b. as Caddy's Lounge (Respondent) (*Withdrawn*)

1291-91-U: Pat Cavicchia (Complainant) v. United Steelworkers of America (U.S.W.A.) Union (Respondent) (*Withdrawn*)

1307-91-U; 1396-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 900501 Ontario Ltd. c.o.b. as Loeb IGA (Respondent) (*Withdrawn*)

1311-91-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Bellai Bros. Ltd. (Respondent) (*Withdrawn*)

1325-91-U: Employees of Joseph Brant Hospital Registered Nurses Assistants, Obstetrical Unit (Complainant) v. Canadian Union of Public Employees, Local 1065 (Respondent) (*Withdrawn*)

1346-91-U: Terry Brasier (Complainant) v. United Steelworkers, Local 4927 and Abex Industries, Human Resources Director (Respondents) (*Withdrawn*)

1374-91-U: United Steelworkers of America (Complainant) v. 503382 Ontario Ltd., c.o.b. as Blackburn Villa (Respondent) (*Withdrawn*)

1426-91-U: Bakery, Confectionery & Tobacco Workers International Union, AFL:CIO:CLC:, Local 264 (Complainant) v. Confectionately Yours, Inc. (Respondent) (*Withdrawn*)

1495-91-U: Canadian Auto Workers (National Office) (Complainant) v. Bosal Canada Inc. (Respondent) (*Withdrawn*)

1499-91-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Longo Brothers Fruit Market Inc. c.o.b. Longo's Fruit Market (Respondent) (*Withdrawn*)

1522-91-U: Phillip John (Complainant) v. Ford Motor Company (Respondent) (*Dismissed*)

1534-91-U: Marilyn Ceccato (Complainant) v. CUPE, Local 1263 (Respondent) (*Withdrawn*)

1571-91-U: John Clark (Complainant) v. U.F.C.W., Local 175-633 and Jim Crocket (Respondents) (*Withdrawn*)

1673-91-U: United Food & Commercial Workers International Union, AFL:CIO:CLC: (Complainant) v. 900501 Ontario Ltd. c.o.b. as Loeb IGA (Respondent) (*Withdrawn*)

1841-91-U: Lidia Oliverio (Complainant) v. District Council of International Ladies Garment Workers Union, Locals 14, 83, 92 (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1004-91-M: UniFirst Canada Ltd. (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

1283-91-M: Depco Metal Products Ltd. (Employer) v. United Steelworkers of America (Trade Union) (*Granted*)

1403-91-M: United Steelworkers of America, Local 15303 (Employer) v. Stephens-Adamson Canada Division of Svedala Industries Canada Inc. (Trade Union) (*Granted*)

JURISDICTONAL DISPUTES

2323-90-JD: C. H. Hiest Ltd. (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 1256 and the Ontario Council of the International Brotherhood of Painters & Allied Trades and International Brotherhood of Painters & Allied Trades, Local 1509 (Respondents) (*Withdrawn*)

3121-90-JD: J.R. Mechanical Inc. (Complainant) v. Sheet Metal Workers' International Association, Local 30 - and - United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Respondents) v. Ontario Sheet Metal & Air Handling Group (Intervener) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2287-90-M: Service Employees' International Union, Local 204 (Applicant) v. Orillia Soldiers Memorial Hospital (Respondent) (*Dismissed*)

2733-90-M: International Union of Operating Engineers, Local 772 (Applicant) v. Labatt's Ontario Breweries Division of Labatt Brewing Company Ltd. (London Plant) (Respondent) (*Withdrawn*)

3328-90-M: Canadian Union of Public Employees and its Local 2293 (Inside Workers) (Applicant) v. The Corporation of the Township of West Carleton (Respondent) (*Withdrawn*)

0233-91-M: Canadian Paperworkers Union, Local 73 (Applicant) v. E.B. Eddy Forest Products (Respondent) (*Withdrawn*)

0508-91-M: Smith Falls Community Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0369-91-OH: Dominik Culjak (Complainant) v. Mount Sinai Hospital (Respondent) (*Dismissed*)

0535-91-OH: The International Association of Machinists & Aerospace Workers, Local Lodge 171 and Tim Mott (Complainant) v. Fleet Industries and Doug Marr (Respondent) (*Withdrawn*)

1147-91-OH: Kenneth Barry (Complainant) v. The Znidar Bros. Equipment Corporation (Respondent) (*Withdrawn*)

1211-91-OH: Diane Schalk (Complainant) v. Entech Laboratories (Respondent) (*Withdrawn*)

1581-91-OH: Fatima Taveira (Complainant) v. Pang Ma (Manager) Scott's Chicken Villa (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1321-90-G: United Brotherhood of Carpenters & Joiners of America, Local 1256 (Applicant) v. C. H. Hiest, Ltd. (Respondent) v. United Brotherhood of Painters & Allied Trades (Intervener) (*Withdrawn*)

2103-90-G; 2104-90-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Company Ltd. and Otis Elevator Company Ltd. (Respondents) (*Withdrawn*)

2390-90-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 4 (Applicant) v. Regional Masonry Contracting (Respondent) (*Granted*)

2669-90-G: Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 30 (Applicants) v. J.R. Mechanical Inc. (Respondent) (*Withdrawn*)

3355-90-G: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. Prezio Electric Ltd. (Respondent) (*Dismissed*)

3436-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. 719330 Ontario Inc. (Respondent) (*Granted*)

0324-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Blue Mountain Flooring Inc. (Respondent) (*Granted*)

0531-91-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Nicholls - Radtke Ltd. (Respondent) (*Withdrawn*)

0556-91-G: Labourers' International Union of North America, Local 837 (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)

0745-91-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Elite Drywall Services (Respondent) (*Withdrawn*)

0977-91-G: Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. CTM Ceramics International Inc. (Respondent) (*Granted*)

1042-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Eastern Construction Company Ltd. (Respondent) (*Withdrawn*)

1070-91-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicant) v. Plibrico (Canada) Ltd. (Respondent) (*Withdrawn*)

1143-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Rabito Sewer & Watermain Construction Ltd. (Respondent) (*Withdrawn*)

1231-91-G: Labourers' International Union of North America, Local 527 (Applicant) v. R. J. Nicol Construction (Respondent) (*Withdrawn*)

1259-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Can-Steel Ltd. (Respondent) (*Granted*)

1269-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Paramount Enterprises Ltd. (Respondent) (*Granted*)

1312-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Bellai Bros. Ltd. (Respondent) (*Withdrawn*)

1314-91-G: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Sieges Ducharme International Inc. (Respondent) (*Granted*)

1318-91-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Vaughan Masonry Inc. (Respondent) (*Withdrawn*)

1324-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. M.D. Carpentry Ltd. (Respondent) (*Granted*)

1361-91-G: Labourers' International Union of North America, Local 1036 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Louis LeBlanc Excavating Ltd. (Respondent) (*Granted*)

1367-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Drainex Construction Ltd. (Respondent) (*Granted*)

1383-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Warren Bitulithic Ltd. (Respondent) (*Withdrawn*)

1393-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)

1406-91-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Gorlan Mechanical Ltd. (Respondent) (*Granted*)

1412-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. R. M. Belanger Ltd. (Respondent) (*Granted*)

1413-91-G: Sheet Metal Workers' International Association, Local 285 (Applicant) v. Michael Zafer, c.o.b. as Remington Metal Fabricators (Respondent) (*Granted*)

1414-91-G: Construction Workers, Local 53, CLAC (Applicant) v. Poirier Electric Ltd. (Respondent) (*Withdrawn*)

1430-91-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Bondfield Construction (1983) Ltd. (Respondent) (*Granted*)

1431-91-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Nordal Construction Ltd. (Respondent) (*Withdrawn*)

1434-91-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Armor Masonry & Precast Ltd. (Respondent) (*Granted*)

1443-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Keith Holdsworth Consulting (Respondent) (*Granted*)

1444-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Conpour Services Ltd. (Respondent) (*Granted*)

1445-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (*Granted*)

1449-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dalv Construction Ltd. (Respondent) (*Granted*)

1453-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Kelmar Utility Contractors Inc. (Respondent) (*Granted*)

1456-91-G: Labourers' International Union of North America, Local 247 (Applicant) v. V.K. Mason Construction Ltd. (Respondent) (*Withdrawn*)

1482-91-G: International Brotherhood of Painters & Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. Alexander Painting & Decorating Company (Respondent) (*Withdrawn*)

1509-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Professional Construction (Respondent) (*Withdrawn*)

1515-91-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)

1518-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. City Interior Company (Respondent) (*Withdrawn*)

1519-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Sera Construction Ltd. (Respondent) (*Granted*)

1548-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Y.G.S. Inc. (Respondent) (*Granted*)

1549-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. A.N.H. Glass Ltd./Aspen Glass Ltd. (Respondent) (*Granted*)

1550-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Granted*)

1599-91-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. John Paul Construction (Respondent) (*Granted*)

1602-91-G; 1740-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

1609-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. New Times Carpentry Ltd. (Respondent) (*Withdrawn*)

1611-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. N.A. Carpentry Ltd. (Respondent) (*Withdrawn*)

1636-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. General Construction Corporation Markham Ltd. (Respondent) (*Withdrawn*)

1644-91-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Electrical Power Systems Construction Association & Ontario Hdyro (Respondent) (*Withdrawn*)

1647-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mountainview Excavating Ltd. (Respondent) (*Granted*)

1674-91-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Gjehub Mechanical Contractors Ltd. (Respondent) (*Granted*)

1685-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Portex Carpentry Services Inc. (Respondent) (*Withdrawn*)

1689-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Kontur Interiors Contracts Inc. (Respondent) (*Withdrawn*)

1736-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. 756298 Ontario Ltd. o/a Lawrence Construction (Respondent) (*Granted*)

1741-91-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Marathon Drywall Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3321-90-U: Ivan Gudelj (Complainant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL:CIO:CLC: Local 64 (Respondent) v. Canron Inc. (Intervener) (*Dismissed*)

0675-91-R: Canadian Union of Public Employees (Applicant) v. Geri-Care Nursing Home of Caressant Care Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener) (*Dismissed*)

0676-91-R: Canadian Union of Public Employees (Applicant) v. Geri-Care Nursing Home of Caressant Care Ltd. (Rest Home) (Respondent) v. Christian Labour Association of Canada (Intervener) (*Granted*)

068820043

***Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4***

ISSN 0383-4778

JUN 3 1992

